No. 14-520

Title:	Valerie J. Hawkins and Janice A. Patterson, Petitioners
	v.
	Community Bank of Raymore
Docketed:	November 5, 2014
Linked with 15A139	
Lower Ct:	United States Court of Appeals for the Eighth Circuit
Case Nos.:	(13-3065)
Decision Date:	August 5, 2014

Questions Presented

---Date---	------Proceedings and Orders----------
Nov 3 2014	Petition for a writ of certiorari filed. (Response due December 5, 2014)
Nov 26 2014	Order extending time to file response to petition to and including January 5, 2015.
Dec 30 2014	Brief of respondent Community Bank of Raymore in opposition filed.
Jan 6 2015	Reply of petitioners Valerie J. Hawkins and Janice A. Patterson filed.
Jan 14 2015	DISTRIBUTED for Conference of February 20, 2015.
Feb 23 2015	DISTRIBUTED for Conference of February 27, 2015.
Mar 2 2015	Petition GRANTED.
Apr 7 2015	The time to file the joint appendix and petitioners' brief on the merits is extended to and including May 18, 2015.
May 18 2015	Joint appendix filed. (Statement of costs filed)
May 18 2015	Brief of petitioners Valerie J. Hawkins and Janice A. Patterson filed.
May 26 2015	Brief amicus curiae of the United States filed.
Jun 12 2015	The time to file respondent's brief on the merits is extended to and including July 24, 2015.
Jul 7 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jul 24 2015	Brief of respondent Community Bank of Raymore filed.
Jul 29 2015	SET FOR ARGUMENT on Monday, October 5, 2015.
Jul 30 2015	Application (15A139) to extend the time to file a reply brief on the merits from August 24, 2015 to September 14, 2015, submitted to Justice Alito.
Jul 30 2015	Brief amici curiae of American Bankers Association, et al. filed. (Distributed)
Jul 31 2015	CIRCULATED.
Aug 6 2015	Application (15A139) granted by Justice Alito extending the time to file the reply brief on the merits until September 3, 2015.
Aug 12 2015	Record requested from U.S.C.A. 8th Circuit.
Aug 19 2015	Record received from U.S.C.A. 8th Circuit. 1 Box.
Aug 28 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Sep 3 2015	Reply of petitioners Valerie J. Hawkins and Janice A. Patterson filed. (Distributed)
Oct 5 2015	Argued. For petitioners: John M. Duggan, Overland Park, Kan.; and Brian H. Fletcher, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Stephen R. McAllister, Lawrence, Kan.

14-520

No. _____

Supreme Court, U.S.
FILED
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In The Supreme Court of the United States

VALERIE J. HAWKINS, and
JANICE A. PATTERSON,

Petitioners,

v.

COMMUNITY BANK OF RAYMORE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Community Bank of Raymore[1] sued housewife Valerie Hawkins for over $2 million claiming Ms. Hawkins owed the money under an absolute, unconditional guaranty regardless of whether CBR sued PHC Development, LLC,[2] the named borrower, or Gary Hawkins, one of PHC's owners. Stated another way, CBR claimed Ms. Hawkins agreed to repay the loans regardless of whether CBR pursued her husband, PHC, or any collateral. CBR claims Ms. Hawkins is "primarily and unconditionally liable" under the agreement she signed. Ms. Hawkins, like Ms. Patterson, was not a member, officer, or otherwise interested in PHC.

Petitioners claim that CBR engaged in marital status discrimination under the Equal Credit Opportunity Act ("ECOA") by requiring their guaranties. The Sixth Circuit recently agreed that spousal guarantors have standing as "applicants" to assert ECOA violations. The Eighth Circuit disagreed with the Sixth Circuit, deciding that ECOA "applicants" unambiguously excludes guarantors. The Eighth Circuit ruling contradicts state courts of last resort in Alaska, Iowa, Missouri, and Virginia. Indeed, spousal guarantors in Iowa or Missouri state courts are afforded protection by the ECOA, but not in federal district courts in Iowa or Missouri.

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[1] Hereinafter referred to as CBR.

[2] Hereinafter referred to as PHC.

QUESTIONS PRESENTED – Continued

The Eighth Circuit's decision raises the following issues not yet decided by this Court:

1. Are "primarily and unconditionally liable" spousal guarantors unambiguously excluded from being ECOA "applicants" because they are not integrally part of "any aspect of a credit transaction"?

2. Did the Federal Reserve Board have authority under the ECOA to include by regulation spousal guarantors as "applicants" to further the purposes of eliminating discrimination against married women?

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A. The Sixth Circuit determined that the ECOA left the precise question of whether a spousal guarantor could be an "applicant" unanswered. The Sixth Circuit deferred to regulators who filled that gap by concluding that spousal guarantors are "applicants" in an effort to further the purposes of the ECOA..... 8

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II. If Congress charges an agency to implement and enforce a statute, then deference is granted to the agency's interpretation of that statute. Congress expressly delegated to the Federal Reserve Board broad authority to prescribe regulations necessary to effectuate the ECOA's purposes. The Eighth Circuit failed to follow binding authorities by substituting its own construction of "applicant" for the decades-long reasonable interpretation made by the Federal Reserve Board 21

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Eighth Circuit Court of Appeals' opinion in *Hawkins, et al. v. Community Bank of Raymore* is reported at 761 F.3d 937 (8th Cir. 2014).

JURISDICTION

Review of the United States Court of Appeals for the Eighth Circuit's August 5, 2014, opinion is requested. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).[3]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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12 C.F.R. § 202.2 – App. 52

12 C.F.R. § 202.7 – App. 59

[3] All references to the United States Code are to the 2014 Code unless expressly otherwise noted.

STATEMENT OF THE CASE

Petitioners challenge the Eighth Circuit's conclusion that Valerie Hawkins and Janice Patterson lack standing as spousal guarantors under the Equal Credit Opportunity Act ("ECOA"). The Eighth Circuit decided the ECOA's definition of "applicant" unambiguously excludes the Petitioners as "primarily and unconditionally liable" spousal guarantors because they were not deemed an integral part of "any aspect of a credit transaction." The Eighth Circuit refused to defer to the Federal Reserve Board's ("FRB") interpretation of "applicant" under 15 U.S.C. § 1691a(b) and the FRB's inclusion of spousal guarantors as "applicants" under Regulation B which prohibits automatically requiring a wife sign a guaranty for her husband's business. The Eighth Circuit's decision directly conflicts with the Sixth Circuit's decision that "applicant" correctly includes spousal guarantors. The Eighth Circuit's ruling also conflicts with decisions by state courts of last resort in Alaska (*Still v. Cunningham*, 94 P.3d 1104 (Alaska 2004)); Iowa (*Bank of the West v. Kline*, 782 N.W.2d 453 (Iowa 2010)); Missouri (*Boone Nat. Sav. & Loan Ass'n v. Crouch*, 47 S.W.3d 371 (Mo. 2001)); and Virginia (*Eure v. Jefferson National Bank*, 448 S.E.245 (Va. 1994)). Review is necessary to resolve splits in authority regarding an important federal matter.

CBR loaned $2,077,900 to develop a residential subdivision owned by PHC in Peculiar, Missouri (the "Loans"). Gary Hawkins (individually) and Chris Patterson (as trustee for the Chris L. Patterson and

Janice A. Patterson Living Trust dated June 14, 2000) are PHC's member-owners. CBR required Petitioners Valerie Hawkins and Janice Patterson (collectively the "Wives" or "Petitioners") to sign sixteen "unconditional and absolute" guaranties over five years purportedly agreeing to repay the Loans (the "Guaranties"). Simply put, CBR claims they can sue and collect the full amount of the Loans from the Wives without ever pursuing Gary Hawkins, Chris Patterson, PHC, or the collateral. CBR sued the Wives to do just that – collect the Loans from the Wives before collecting from Gary Hawkins, Chris Patterson, PHC, or the collateral.

The Guaranties state that:

> Lender can enforce this Guaranty against Guarantor even when Lender has not exhausted Lender's remedies against anyone else obligated to pay the Indebtedness or against any collateral securing the Indebtedness, this Guaranty or any other guaranty of the Indebtedness.

The Guaranties further state that:

> Guarantor's Share of the Indebtedness will only be reduced by sums actually paid by Guarantor under this Guaranty, but will not be reduced by sums from any other source including, but not limited to, sums realized from any collateral securing the Indebtedness or this Guaranty, or payments by anyone other than Guarantor.

The Wives asserted federal question jurisdiction under 28 U.S.C. § 1331, claiming that CBR violated the ECOA and Regulation B based on marital status by requiring the Guaranties. CBR's Counterclaim and Amended Counterclaim invoked supplemental jurisdiction under 28 U.S.C. § 1367(a), claiming the right to collect the Guaranties. CBR sought summary judgment on Petitioners' ECOA claim and affirmative defense.

The District Court concluded that Petitioners were not ECOA "applicants" and had no standing (the "ECOA Order"). The District Court then discontinued exercise of supplemental jurisdiction dismissing CBR's Counterclaims without prejudice under 28 U.S.C. § 1367(c) on August 30, 2013. The District Court entered Judgment on September 6, 2013, and an Amended Judgment on September 10, 2013. Petitioners timely filed their notice of appeal on September 13, 2013. The Eighth Circuit heard oral argument on April 17, 2014, and issued its Opinion on August 5, 2014.

The question for this Court is whether "primarily and unconditionally" liable spousal guarantors are "applicants" for "any aspect of a credit transaction" under the ECOA. Alternatively, are such persons unambiguously excluded from being "applicants" as determined by the Eighth Circuit? The Alaska, Iowa, Missouri, and Virginia Supreme Court's and the Sixth

Circuit's decisions are antithetical to the Eighth Circuit's conclusion.

REASONS FOR GRANTING THE PETITION

I. The Sixth and Eighth Circuit expressly disagree whether ECOA "applicants" for "any aspect of a credit transaction" unambiguously excludes spousal guarantors. This split casts doubt on the validity of regulations which have included spousal guarantors as "applicants" for decades. Review is necessary to resolve the circuit split on this important matter concerning a significant federal statute with far-reaching implications for lenders, future credit applicants, and lender-required spousal guarantors.

The Eighth Circuit's decision directly conflicts with the Sixth Circuit's prior decision on the same important issue: Whether "applicants" for "any aspect of a credit transaction" under the ECOA unambiguously excludes spousal guarantors such that guarantors have no standing under the ECOA. *See* S. Ct. R. 10 (providing that the Court, when considering review on a writ of certiorari, considers whether "a United States court of appeals has entered a decision in conflict with a decision of another United States court of appeals on the same important matter.").

The ECOA states "it shall be unlawful for any creditor to discriminate against any applicant, with

respect to any aspect of a credit transaction – (1) on the basis of sex or marital status." 15 U.S.C. § 1691(a)(1). The ECOA's purpose is "to eradicate credit discrimination waged against women, especially married women." *Mays v. Buckeye Rural Elec. Coop.*, 277 F.3d 873, 876 (6th Cir. 2002). Only "aggrieved applicants" are afforded standing to sue for ECOA violations. *See* 15 U.S.C. § 1691e. The ECOA defines applicant as:

> any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit.

15 U.S.C. § 1691a(b).

Using broad statutory authority under the ECOA (*see* 15 U.S.C. § 1691b(a)), the FRB[4] implemented Regulation B in 1974. Regulation B states, in part, that "[a] creditor shall not require the signature of an applicant's spouse or other person on a credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested." 12 C.F.R. § 202.7(d)(1). Regulation B further states that if an additional party is necessary to support the credit

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[4] The 2010 amendments to the ECOA vested the authority to promulgate regulations under the statute to the Consumer Financial Protection Bureau.

requested "[t]he applicant's spouse may serve as an additional party, but the creditor shall not require that the spouse be the additional party." 12 C.F.R. § 202.7(d)(5).

Regulation B originally excluded guarantors from ECOA protection. In 1985, however, the FRB amended Regulation B to include guarantors as "applicants" affording spousal guarantors who were unlawfully required to sign guaranties standing to seek legal remedies. *See* 12 C.F.R. § 202.2(e); 50 Fed. Reg. 48,020 (1985) (official staff commentary).

The Sixth and Eighth Circuits disagree whether the FRB exceeded its authority. *Compare RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC*, 754 F.3d 380, 385-86 (6th Cir. 2014); *Hawkins v. Community Bank of Raymore*, 761 F.3d 937, 940-43 (8th Cir. 2014).

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984), this Court determined a two-step analysis applies to whether deference is afforded to regulators. Step one requires analysis of whether "Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842-43. The Court must find "clear congressional intent" contrary to an agency's interpretation prior to invalidating the federal regulation. *Ragsdale v. Wolverine Worldwide, Inc.*, 218

F.3d 933, 936 (8th Cir. 2000).[5] The Sixth Circuit deemed the ECOA's definition of "applicant" broad without directly speaking to the precise question concerning a spousal guarantor's status as an "applicant." *See RL BB Acquisition*, 754 F.3d at 385-86. Conversely, the Eighth Circuit found that Congress intended "applicant" to unambiguously exclude guarantors. *See Hawkins*, 761 F.3d at 940-43.

The United States Supreme Court should resolve the circuit split on this important matter. *See* Sup. Ct. R. 10(a).

A. The Sixth Circuit determined that the ECOA left the precise question of whether a spousal guarantor could be an "applicant" unanswered. The Sixth Circuit deferred to regulators who filled that gap by concluding that spousal guarantors are "applicants" in an effort to further the purposes of the ECOA.

The Sixth Circuit concluded that the ECOA's definition of "applicant" is not straightforward, and is "easily broad enough to capture a guarantor." *RL BB Acquisition*, 754 F.3d at 386. The Sixth Circuit cited Webster's Dictionary's definition of "applies," which is

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[5] The court only analyzes the second step if the statute does not answer the precise issue presented. *Chevron*, 467 U.S. at 843. In the second step, the Court must determine whether the regulation "is based on a permissible construction of the statute." *Id.*

"to make an appeal or request esp. formally and often in writing and usu. for something of benefit to oneself." *Id.* at 385. While a guarantor does not "traditionally" approach a creditor for credit, a guarantor does "formally approach" the creditor by offering personal liability. *Id.* The guarantor signs in consideration of the borrower receiving credit – not gratuitously. *Id.* While "applicant" could be narrowly construed to include only the business entity making the *initial* approach, the Sixth Circuit recognized "applicant" *could* broadly encompass "all those who offer promises in support of an application – including guarantors." *Id.*

The Sixth Circuit further analyzed the ECOA's definition of "credit" as "the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment thereof." *Id.* This definition "makes clear" that "an 'applicant' requests credit, but a 'debtor' reaps the benefit." *Id.* Since the "applicant" and the "debtor" are not always one in the same, it "would be reasonable to conclude that the applicant could be a third party, such as a guarantor." *Id.* The Sixth Circuit found "no reason to artificially limit the possible meanings of 'applicant'" considering the ECOA prohibits discrimination "with respect to *any aspect* of a credit transaction" and has "broad remedial goals." *Id.* (emphasis in original). The Sixth Circuit determined that Congress has not precisely addressed whether an "applicant" excludes a guarantor. *Id.*

The Sixth Circuit's step two reviewed whether Regulation B's inclusion of guarantors as applicants "is based on a permissible construction of the statute." *Id.* at 385-86. The court determined that "'at least one of the natural meanings' of applicant includes guarantors," therefore the FRB's definition is permissible and entitled deference. *Id.* Rather than allowing guarantors unlimited standing to assert ECOA violations, the FRB restrained the definition of "applicant" as including guarantors who were wrongly required to sign on behalf of their spouses under § 202.7(d). *Id.* at 386. The FRB limited guarantors' ECOA protection cautiously because "unlimited inclusion of guarantors and similar parties in the definition might subject creditors to risk of liability for technical violations of various provisions of the regulation." *Id.* This "reasoned response" was not "arbitrary, capricious, or manifestly contrary to the statute," and is therefore entitled deference. *Id.*

B. The Eighth Circuit conversely concluded that Congress intended the ECOA's definition of "applicant" to unambiguously exclude guarantors.

Two months after the Sixth Circuit's decision, the Eighth Circuit disagreed with *RL BB Acquistion*. *See Hawkins v. Community Bank of Raymore*, 761 F.3d 937, 941 (8th Cir. 2014) (stating that the "Sixth Circuit recently reached the contrary conclusion, finding it ambiguous whether a guarantor qualifies as an applicant under the ECOA").

The Eighth Circuit decided that the ECOA's definition of applicant unambiguously excludes spousal guarantors. *Hawkins*, 761 F.3d at 940-43. Though a guarantor "desires for a lender to extend credit to a borrower," the Eighth Circuit concluded that a guarantor does not request credit or otherwise apply for credit by signing a guaranty. *Id.* at 941-43. The Eighth Circuit found that "***assuming a secondary, contingent liability*** does not amount to a request for credit" because a guarantor "engages in different conduct, receives different benefits, and ***exposes herself to different legal consequences than does a credit applicant.***"[6] *Id.* at 943 (emphasis supplied). The Eighth Circuit implied that the Sixth Circuit "manufactured" statutory ambiguity to defeat Congress's

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[6] In stating that guarantors incur only "secondary" and "contingent" liabilities, the Eighth Circuit ignored CBR's claims and the record on appeal. CBR claims the Wives' guaranties are "primary and absolute" liabilities, and that the lender may collect from guarantors without first pursuing the borrower or any collateral. Simply put, guarantors become primarily liable whether the lender chooses to collect against the "borrower" or not. Here, the Guaranties state that "Lender can enforce this Guaranty against Guarantor even when Lender has not exhausted Lender's remedies against anyone else obligated to pay the Indebtedness or against any collateral securing the Indebtedness, this Guaranty or any other guaranty of the Indebtedness."

CBR claimed that the Wives are "primarily and unconditionally" liable for the "Indebtedness." CBR pursued claims against the Wives asserting it may collect the entire debt from the Wives without ever pursuing their husbands, PHC, or the collateral.

unambiguous intent that "applicants" excludes guarantors. *Id.* at 941.

The Eighth Circuit cited with favor the Seventh Circuit's opinion in *Moran Foods, Inc. v. Mid-Atlantic Market Dev. Co.*, 476 F.3d 436 (7th Cir. 2007). *Moran* stated "there is nothing ambiguous about 'applicant' and no way to confuse an applicant with a guarantor."[7] 476 F.3d at 441. The Seventh Circuit further reasoned that interpreting "applicant" to embrace guarantors would open "vistas of liability" that Congress would have been "unlikely to accept." *Id.*

The Sixth Circuit in *RL BB Acquisition* disagreed with the Seventh Circuit's "vistas of liability" concern. *RL BB Acquisition*, 754 F.3d at 386. The Sixth Circuit stated it was "not troubled by the prospect of guarantors being made whole after a creditor violates the law." *Id.* The Sixth Circuit expressed its unwillingness to "strike down a valid regulation to salvage bad underwriting" and "invalidate a regulation over a disagreement with an agency's policy which Congress has had time and opportunity to reverse." *Id.*

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[7] The Seventh Circuit later referred to this paragraph as dicta in *Estate of Davis v. Wells Fargo Bank*, 633 F.3d 529, 538 (7th Cir. 2011). Concerns raised regarding the definition of "applicant" in *Moran* were merely dicta because there was no need to resolve the threshold issue of whether a plaintiff was an "applicant" under the ECOA because the plaintiff in *Moran* had failed to submit sufficient evidence of discrimination to survive summary judgment. *Davis*, 633 F.3d at 538.

The Eighth Circuit's opinion established a clear circuit split which this Court should grant certiorari to resolve.

C. The "vast majority" of other jurisdictions, including the Third Circuit, agree that the definition of "applicant" includes guarantors.

The Third Circuit Court of Appeals in *Silverman v. Eastrich* accepted § 202.2(e)'s inclusion of guarantors as "applicants", stating that "the ECOA has from its inception prohibited requiring spousal guaranties." 51 F.3d 28, 31 (3d Cir. 1995). The United States District Court for the Northern District of Oklahoma in *Empire Bank v. Dumond* recently found that "[w]hether the term 'applicant' includes guarantors is not unambiguous," and that "[a]ccepting that the term includes guarantors would best effectuate the ECOA's goal of preventing discrimination based upon marital status." No. 13-CV-0388, 2013 WL 6238605, at *6 (N.D. Okla. Dec. 3, 2013).

The "vast majority of courts" agree that "applicant" should include spousal guarantors. *See Citgo Petroleum Corp. v. Bulk Petroleum Corp.*, No. 08-CV-654, 2010 WL 3931496, at *9 (N.D. Okla. Oct. 5, 2010) (declining to follow *Moran* and adhering to Regulation B); *F.D.I.C. v. Medmark, Inc.*, 897 F.Supp. 511, 514 (D. Kan. 1995) (concluding a guarantor may assert an alleged ECOA violation defensively); *Bank of the West v. Kline,* 782 N.W.2d 453, 458 (Iowa 2010)

(holding that guarantors are "applicants" under the ECOA); *W. Star Fin., Inc. v. White*, 7 P.3d 502, 505-06 (Okla. Civ. App. 2000) (allowing the claim of a spousal guarantor that her rights under the ECOA were violated to proceed to trial); *Eure v. Jefferson Nat'l Bank*, 448 S.E.2d 417, 417-18, 421 (Va. 1994) (determining that requiring a spousal guaranty in violation of Regulation B is a violation of the ECOA); *see also Mayes v. Chrysler Credit Corp.*, 167 F.3d 675, 677 (1st Cir. 1999) ("The paradigm case is the spouse who is wrongly made to guarantee a debt but may be unconscious of the violation. . ").

The Eighth Circuit's decision runs counter to the "vast majority." The Eighth Circuit's decision concludes Regulation B's § 202.2(e) is invalid and leaves the ECOA's scope uncertain.

D. This case raises important issues concerning the ECOA's scope. The Eighth Circuit's interpretation of "applicant" impermissibly narrows the ECOA's protection to only the borrowing entity that approaches the lender, and leaves individual minority business owners unprotected against discrimination because they do not meet the Eighth Circuit's technical definition of "applicant." The Sixth Circuit's interpretation correctly concludes additional persons/entities offering promises supporting an application can be "applicants." Review is necessary to resolve this important issue of federal law.

Certiorari may be granted when important issues are raised concerning a federal statute's scope. *See Arroyo v. U.S.*, 359 U.S. 419, 421, 79 S.Ct. 864 (1959); *Palermo v. U.S.*, 360 U.S. 343, 345, 79 S.Ct. 1217 (1959). This case raises questions regarding the extent of the ECOA's protection. The Eighth Circuit concluded the ECOA only protects borrowers or individuals who actively "participated in the loan-application process," and the Sixth Circuit protects others (such as guarantors and sureties) who offer promises supporting the application. *See Hawkins*, 761 F.3d at 943; *RL BB Acquisition*, 754 F.3d at 385. The Eighth Circuit narrowed the ECOA's protections by invalidating decades-old regulations, leaving spousal guarantors such as Valerie Hawkins and Janice Patterson without protections previously afforded.

The Eighth Circuit reasoned that the ECOA protects individuals who have "participated in the loan-application process." *Hawkins*, 761 F.3d at 943. The Eighth Circuit did not elaborate on the extent to which individuals must "participate" in the loan-application process to qualify as applicants, except to state that guarantors do not "participate" by virtue of signing their guaranties. *Id.* at 940-43. The Eighth Circuit determined that the Wives, based purely on their status as guarantors, could not be considered applicants. *Id.* The Eighth Circuit's lack of analysis is telling because it limits protection only to the borrowing entity who applied for the loan.

For example, under the Eighth Circuit's impermissibly narrow reading of "applicant," if the Wives had co-signed promissory notes with PHC, the Wives are "applicants." However, simply because the Wives signed as "absolute and unconditional" guarantors, which CBR asserts leaves the Wives in the same position as if they had co-signed the notes, the Eighth Circuit ruled that the Wives are not entitled to ECOA protection. The Eighth Circuit's narrow reading is circuitous and elevates form over substance.

The ECOA prohibits discrimination against "any applicant, with respect to any aspect of a credit transaction." 15 U.S.C. § 1691(a). The Eighth Circuit made an end-run around the "any aspect of a credit transaction" language. The Eighth Circuit ignored this expansive language and ruled, without definition or explanation, that ECOA protection is only afforded to participants in the "loan application process."

Hawkins, 761 F.3d at 943. What does this vague notion really mean? Is only the borrowing entity participating in "any aspect of a credit transaction"? Is a lender-required spousal guarantor not participating? Did PHC's owners, Chris Patterson and Gary Hawkins, also guarantors, participate in the "loan application process"? If so, how was their participation different than the Wives'? These questions indict the Eighth Circuit's ruling.

Under the Eighth Circuit's narrow reading, if two minority women form a limited liability company to operate their business, and they are denied credit, they have no standing because the limited liability company is technically the "borrower" and the only "applicant." The Eighth Circuit followed neither its own precedent nor precedent from this Court. Rather than give *Chevron* deference to the FRB's Congressionally delegated interpretation of "applicant" for "any aspect of a credit transaction," the Eighth Circuit, utilizing the fiction that the Wives' liability was "secondary" to that of PHC, imposed its "own construction on the [ECOA]." *Young v. Community Nutrition Institute*, 476 U.S. 974, 980, 106 S.Ct. 2360 (1986) (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43).

The protections afforded by and liability imposed under the ECOA are important issues with far-reaching consequences for lenders, future credit applicants, and lender-required spousal guarantors. Parties to credit transactions lack definitive guidance. Without review by this Court, "federal law will

be administered in different ways in different parts of the country; citizens in some circuits are subject to liabilities or entitlements that citizens in other circuits are not burdened with or entitled to." *Beaulieu v. United States*, 497 U.S. 1038, 110 S.Ct. 3302 (1990) (White, J., dissenting) (denial of petition for writ of certiorari); *see also Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S.Ct. 422 (1923) (noting that granting review is proper in "cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals").

E. The ECOA and Regulation B protect individuals such as Valerie Hawkins and Janice Patterson from financial ruin resulting from their spouses' failed business ventures. The Eighth Circuit's interpretation of "applicant" removes spousal guarantors from the ECOA's protection, permits destruction of disinterested spouses' creditworthiness, and promotes credit discrimination against married women.

Small business owners like Gary Hawkins are often mandated to obtain spousal guaranties as a condition for a commercial loan. By requiring the spouse to guaranty credit to a borrowing entity in which that spouse has no interest or position, the lender requires

the spousal guarantor to incur (often extensive) liability solely based on marital status. The disinterested spousal guarantor does not control significant liabilities resulting from business failures. These liabilities impair the spouse's creditworthiness, often making it impossible to independently qualify for future credit.

For example, Valerie Hawkins, according to CBR's allegations, was "primarily and unconditionally" liable for over $2 million. If lenders are permitted to require uninterested spousal guaranties, credit will be unavailable to otherwise creditworthy, married applicants such as Valerie Hawkins. *See Anderson v. United Finance Co.*, 666 F.2d 1274, 1277 (9th Cir. 1982).

Curiously, the Eighth Circuit concluded that the ECOA's policies "focus on ensuring fair access to credit by preventing lenders from excluding borrowers from the credit market based on the borrower's marital status." *Hawkins*, 761 F.3d at 942. The Eighth Circuit claims that the ECOA's purpose does not extend to spousal guarantors who claim to have been improperly *included* in the lending process, rather than *excluded* due to marital status. *Id.* The Eighth Circuit's analysis ignores damage to the disinterested spouse's independent creditworthiness caused by spousal guaranties required by lenders.

Here, CBR required Valerie Hawkins to execute personal guaranties which CBR claims require her to individually repay the Loans. Ms. Hawkins holds no

ownership interest, position, or other interest in PHC. CBR required that she execute personal guaranties as a condition for PHC, her husband's small business, to receive credit from CBR.

Married applicants saddled with their spouse's debt become unbankable and unable to independently qualify for credit. Regulation B's inclusion of spousal guarantors as "applicants" "best effectuate[s] the ECOA's goal of preventing discrimination based upon marital status." *Empire Bank v. Dumond*, No. 13-CV-0388, 2013 WL 6238605, at *6 (N.D. Okla. Dec. 3, 2013). The Eighth Circuit's decision eliminates "entire aspects of the Federal Reserve Board's implementation scheme," including protection for spousal guarantors. *Citgo Petroleum Corp.*, 2010 WL 3931496, at *9.

Review is necessary to resolve the conflict between the Sixth and Eighth Circuits and to reverse the Eighth Circuit's erroneous ruling in *Hawkins v. Community Bank of Raymore*.

II. If Congress charges an agency to implement and enforce a statute, then deference is granted to the agency's interpretation of that statute. Congress expressly delegated to the Federal Reserve Board broad authority to prescribe regulations necessary to effectuate the ECOA's purposes. The Eighth Circuit failed to follow binding authorities by substituting its own construction of "applicant" for the decades-long reasonable interpretation made by the Federal Reserve Board.

Congress expressly delegated authority to the FRB to "prescribe regulations" that "in the judgment of the [Federal Reserve Board] are necessary or proper to effectuate the purposes" of the ECOA, "to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith." 15 U.S.C. § 1691b(a). The FRB followed its Congressional directive and interpreted the term "applicant" promulgating Regulation B to effectuate the purposes of the ECOA. It is well-settled that the agency's interpretation of the statute it is charged to administer is entitled to great deference:

> The view of the agency charged with administering the statute is entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction that [the agency] might have adopted but only that [the agency's] understanding of this very 'complex statute' is a sufficiently

> rational one to preclude a court from substituting its judgment for that of [the agency].

Young v. Community Nutrition Institute, 476 U.S. 974, 981, 106 S.Ct. 2360 (1986) (citations omitted).

Chevron deference is appropriate "when it appears that Congress delegated authority to the agency to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Beeler v. Astrue*, 651 F.3d 954, 959 (8th Cir. 2011) (citing *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 129 S.Ct. 1498 (2009)).

The ECOA prohibits discrimination against "any applicant, with respect to any aspect of a credit transaction." 15 U.S.C. § 1691(a). The Eighth Circuit made an end-run around the "any aspect of a credit transaction" language. The Eighth Circuit ignored this expansive language and ruled, without definition or explanation, that ECOA protection is only afforded to participants in the "loan application process." *Hawkins*, 761 F.3d at 943. Under the Eighth Circuit's narrow reading, if two minority women form a limited liability company to operate their business, and they are denied credit, they have no standing because the limited liability company is technically the "borrower" and the only "applicant." The Eighth Circuit followed neither its own precedent nor precedent from this Court. Rather than give *Chevron* deference to the FRB's Congressionally delegated interpretation of "applicant" for "any aspect of a credit transaction,"

the Eighth Circuit, utilizing the fiction that the Wives' liability was "secondary" to that of PHC, imposed its "own construction on the [ECOA]." *Young*, 476 U.S. at 980 (quoting *Chevron*, 467 U.S. at 842-43).

Here, the Eighth Circuit's substitution of its judgment for the FRB's ignores the Wives' position at each loan renewal. The computer-generated form guaranties, routinely utilized by CBR and other lenders, impose "primary and unconditional liability." At each renewal, Valerie Hawkins, who CBR claims is "primarily and unconditionally" liable for over $2 million, certainly wanted "an extension, renewal or continuation of credit" as provided under the ECOA. 15 U.S.C. § 1691a. Under the Eighth Circuit's narrow reasoning, a "primarily and unconditionally liable" spousal guarantor who wants to renew, extend or continue the credit is not an "applicant" because Congress unambiguously intended to exclude them from the ECOA's protections because they did not participate in the initial "loan-application process." The Eighth Circuit's conclusion ignores that an "applicant" for "any aspect of a credit transaction" includes loan renewals.

Finally, the ECOA "has undergone several amendments since the Federal Reserve included guarantors within the definition of 'applicant' – including an extensive amendment after *Moran* was decided – and none has clarified that the term 'applicant' cannot include guarantors." *RL BB Acquisition*, 754 F.3d at 386. "[C]ongressional failure to revise or repeal the

agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Young*, 476 U.S. at 983 (quoting *NLRB v. Bell Aerospace, Co.*, 416 U.S. 267, 275, 94 S.Ct. 1757 (1974)). Congress's decision to leave unchanged the FRB's ECOA interpretation and promulgation of Regulation B did not give the Eighth Circuit license to substitute its judgment for the FRB's. *Chevron*, 467 U.S. at 844 ("A court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").[8]

III. Review is necessary because the Eighth Circuit's decision on this important federal question conflicts with state courts of last resort. The Eighth Circuit's decision conflicts with the Alaska Supreme Court's decision in *Still v. Cunningham*, the Iowa Supreme Court's decision in *Bank of the West v. Kline*, the Missouri Supreme Court's decision in *Boone Nat. Sav. & Loan Ass'n v. Crouch*, and the Virginia Supreme Court's decision in *Eure v. Jefferson Nat'l Bank*.

The Eighth Circuit's opinion directly conflicts with decisions by the Alaska, Iowa, Missouri, and

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[8] Unlike the Eighth Circuit, the Sixth Circuit is unwilling to "strike down a valid regulation to salvage bad underwriting" and "invalidate a regulation over a disagreement with an agency's policy which Congress has had time and opportunity to reverse." *RL BB Acquisition*, 754 F.3d at 386.

Virginia Supreme Courts. *See* Sup. Ct. R. 10(a)-(b) (providing that the Court, in considering review on a writ of certiorari, considers whether "a United States court of appeals has decided an important federal question in a way that conflicts with a decision by a state court of last resort."). Review is necessary to resolve this split in authority.

The Alaska Supreme Court ruled that a wife was not liable on her guaranty because the lender violated the ECOA by requiring her guaranty. *Still v. Cunningham*, 94 P.3d 1104, 1118 (Alaska 2004) (affirming judgment exonerating Wanda Still from liability on guaranty and reversing and remanding for entry of attorney's fees in favor of Mrs. Still for successful assertion of claim for equitable relief under 15 U.S.C. § 1691e(c)).

The Iowa Supreme Court ruled that spousal guarantors are "applicants" with standing to assert ECOA violations. *Kline*, 782 N.W.2d at 458. The Iowa Supreme Court enforced § 202.2(e)'s definition of "applicant," finding that the Federal Reserve Board properly exercised its authority to enact regulations to carry out the ECOA's purposes. *Id.* at 457-58. If lenders are allowed to require and enforce spousal guaranties, "the purpose of the act – that a creditor cannot require the signature of an applicant's spouse or any other person if the applicant is individually creditworthy – would be frustrated." *Id.* at 462.

The Eighth Circuit contradicted the Iowa Supreme Court's opinion by stating that the definition of

"applicant" does not include guarantors. The Eighth Circuit's championing of the dicta in *Moran* not only created a conflict with the Sixth Circuit, but runs counter to established Iowa Supreme Court precedent. Spousal guarantors in Iowa state courts are afforded protection by the ECOA, but not in federal district court in Iowa.

The Missouri Supreme Court ruled that a spousal guarantor need not have ECOA standing to defend against enforcement of her illegal guaranty. *Boone Nat. Sav. & Loan Ass'n v. Crouch*, 47 S.W.3d 371, 374-75 (Mo. 2001). In *Boone*, a spousal guarantor's claim for damages and attorneys' fees was time-barred by the ECOA's two-year statute of limitations. *Id.* at 374. The spousal guarantor was nevertheless allowed to assert the "essence" of her ECOA claim as an affirmative defense to liability. *Id.* at 375. The Missouri Supreme Court decided that the guaranty contract was unenforceable by way of "estoppel" when illegally procured in violation of the ECOA and Regulation B. *Id.* at 376.

Regulation B, § 202.7(d) prohibits lenders from requiring spousal guaranties. *Boone* affords Valerie Hawkins and Janice Patterson standing to defend against the enforcement of guaranties illegally procured in violation of § 202.7(d) even if they are not "applicants" under the ECOA. The Eighth Circuit, however, in contravention of *Boone*, ruled that "Hawkins and Patterson are not applicants under the ECOA" and therefore CBR "did not violate the ECOA by

requiring them to execute the guaranties." *Hawkins*, 761 F.3d at 943.

The remedies and/or defenses available to a spousal guarantor in Missouri now depend on the forum of the suit. A spousal guarantor in federal district court in Missouri is afforded no protections by the ECOA, but in a Missouri state court can assert a defense that a guaranty was illegally procured under the ECOA.

Similarly, the Virginia Supreme Court held that the ECOA could be used by the wife to avoid liability on her guaranty which she had been required to sign solely because of her status as the wife of the credit applicant. *Eure v. Jefferson Nat'l Bank*, 448 S.E.2d 417 (Va. 1994) (reversing circuit court's judgment for lender and remanding for judgment in favor of Mrs. Eure on lender's guaranty claim.). The Eighth Circuit's decision eliminating protection for spousal guarantors conflicts with decisions issued by the Alaska and Virginia Supreme Courts.

Review is necessary to resolve the conflict between the Eighth Circuit and the state supreme courts in Alaska, Iowa, Missouri, and Virginia. *See* Sup. Ct. R. 10(a).

CONCLUSION

For the foregoing reasons, Petitioners request this Court grant review to reverse the Eighth Circuit Court of Appeals' holding that the ECOA's definition

of "applicant" unambiguously excludes guarantors. Petitioners also request remand of this proceeding to the District Court for resolution on the merits. Due to the complex statutory and regulatory scheme at issue, Petitioners respectfully request the Court to invite the Solicitor General to file a brief in this case expressing the views of the United States.

Respectfully submitted,

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761 F.3d 937
United States Court of Appeals,
Eighth Circuit.

Valerie J. HAWKINS, Individually; Janice A. Patterson, Individually Plaintiffs-Appellants

v.

COMMUNITY BANK OF RAYMORE, Defendant-Appellee.

No. 13-3065. | Submitted: April 17, 2014. | Filed: Aug. 5, 2014.

Attorneys and Law Firms

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Before SMITH, COLLOTON, and GRUENDER, Circuit Judges.

Opinion

GRUENDER, Circuit Judge.

Valerie Hawkins ("Hawkins") and Janice Patterson ("Patterson") appeal the district court's[1] grant of

[1] The Honorable Dean Whipple, United States District Judge for the Western District of Missouri.

summary judgment in favor of Community Bank of Raymore ("Community") on their claim under the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691 *et seq.*, and the district court's order striking their demand for a jury trial. For the reasons described below, we affirm.

I. Background

Hawkins is married to Gary Hawkins, and Patterson is married to Chris Patterson. PHC Development, LLC ("PHC"), is a Missouri limited liability company with two members: Gary Hawkins and Chris Patterson, the latter in his capacity as trustee of the Chris L. Patterson and Janice A. Patterson Trust. Neither Hawkins nor Patterson have any legal interest in PHC. Between 2005 and 2008, Community made four loans – totaling more than $2,000,000 – to PHC to fund the development of a residential subdivision. Each loan was modified several times. In connection with each loan and each modification, Hawkins, Patterson, and their husbands executed personal guaranties in favor of Community to secure the loans. Patterson also executed a deed of trust in connection with one of the modifications. In April 2012, PHC failed to make payments due under the loan agreements. Community declared the loans to be in default, accelerated the loans, and demanded payment both from PHC and from Hawkins and Patterson as guarantors.

Soon thereafter, Hawkins and Patterson filed this action against Community, seeking damages and an order declaring that their guaranties were void and unenforceable. They alleged that Community had required them to execute the guaranties securing PHC's loans solely because they are married to their respective husbands. They claimed that this requirement constituted discrimination against them on the basis of their marital status, in violation of the ECOA. Community, in turn, filed several state-law counterclaims, including claims for breach of the guaranties. As an affirmative defense to the breach-of-guaranty claims, Hawkins and Patterson argued that the guaranties were unenforceable as violative of the ECOA.

Community moved for summary judgment on Hawkins and Patterson's ECOA claim and on its breach-of-guaranty counterclaims. The district court concluded that Hawkins and Patterson were not "applicants" within the meaning of the ECOA and thus that Community had not violated the ECOA by requiring them to execute the guaranties. Accordingly, the district court granted summary judgment in favor of Community on Hawkins and Patterson's ECOA claim and on their ECOA-based affirmative defense to Community's breach-of-guaranty counterclaims. The district court then dismissed Community's state-law counterclaims without prejudice, declining to exercise continuing supplemental jurisdiction pursuant to 28 U.S.C. § 1367(c)(3). Hawkins and Patterson timely appealed the grant of summary

judgment in favor of Community and the district court's order striking their demand for a jury trial.

II. Discussion

We review the district court's grant of summary judgment *de novo,* viewing the record in the light most favorable to the nonmoving parties and giving them the benefit of all reasonable inferences. *Barnhardt v. Open Harvest Coop.,* 742 F.3d 365, 369 (8th Cir.2014). Summary judgment is proper only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a).

The ECOA makes it "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction on the basis of marital status." 15 U.S.C. § 1691(a). The statute defines "applicant" as "any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit." 15 U.S.C. § 1691a(b). Interpreting this statutory definition, the Federal Reserve Bank promulgated 12 C.F.R. § 202.2(e), which provides that "the term [applicant] includes guarantors."[2] Relying on § 202.2(e), Hawkins

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[2] Congress has since amended the ECOA to vest authority to promulgate regulations under the statute in the Consumer Financial Protection Bureau, rather than in the Federal Reserve

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and Patterson argue that they qualify as applicants within the meaning of the ECOA because they guaranteed PHC's debt to Community. They do not argue that they qualify as applicants on any other basis.

This case turns, then, on whether we should apply § 202.2(e)'s definition of applicant, which would permit Hawkins and Patterson to pursue an ECOA claim as applicants solely because they executed guarantees to secure PHC's loans. If they do not qualify as applicants, then Community did not violate the ECOA by requiring them to execute the guaranties. *See* 15 U.S.C. § 1691(a) (proscribing only discrimination against applicants). To determine whether we should defer to the Federal Reserve's interpretation of the ECOA's definition of applicant, we apply the two-step framework established by *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Under the *Chevron* framework, "we ask first whether the intent of Congress is clear as to the precise question at issue. If, by employing traditional tools of statutory construction, we determine that Congress' intent is clear, that is the end of the matter." *North Dakota v. E.P.A.,* 730 F.3d 750, 763 (8th Cir.2013) (alteration omitted) (quoting *Baptist Health v. Thompson,* 458 F.3d 768, 773 (8th Cir.2006)). Only if we conclude that "the statute is silent or ambiguous with respect to the

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Board. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub.L. No. 111-203, § 1085(1), 124 Stat. 1376, 2083 (2010).

specific issue" presented will we then proceed to the second step of the *Chevron* framework, which requires us to consider whether "the agency's reading fills a gap or defines a term in a reasonable way in light of the Legislature's design." *Id.* (quoting *Baptist Health*, 458 F.3d at 773).

Applying the first step of the *Chevron* framework, we conclude that the text of the ECOA clearly provides that a person does not qualify as an applicant under the statute solely by virtue of executing a guaranty to secure the debt of another. To qualify as an applicant under the ECOA, a person must "appl[y] to a creditor directly for credit, or indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit." 15 U.S.C. § 1691a(b). To "apply" means "to make an appeal or request esp[ecially] formally and often in writing and usu[ally] for something of benefit to oneself." Webster's Third New International Dictionary 105 (2002). Thus, the plain language of the ECOA unmistakably provides that a person is an applicant only if she requests credit. But a person does not, by executing a guaranty, request credit. "A 'guaranty' [is] a promise to answer for another person's debt, default, or failure to perform. More specifically, a guaranty is an undertaking by a guarantor to answer for payment of some debt, or performance of some contract, of another person in the event of default." 38 Am.Jur.2d Guaranty § 1 (2014). A guaranty is collateral and secondary to the underlying loan transaction between the lender and the borrower. While a guarantor no doubt desires for a lender to extend credit to

a borrower, it does not follow from the execution of a guaranty that a guarantor has requested credit or otherwise been involved in applying for credit. Thus, a guarantor does not request credit and therefore cannot qualify as an applicant under the unambiguous text of the ECOA.[3]

The Sixth Circuit recently reached the contrary conclusion, finding it to be ambiguous whether a guarantor qualifies as an applicant under the ECOA. *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp.*, 754 F.3d 380 (6th Cir.2014)[4] The court acknowledged that "[a] guarantor does not traditionally approach a creditor herself for credit. Rather, a guarantor is a third party to the larger application process." *Id.* at 385. With this much we agree, and for us, this ends the inquiry because it demonstrates that a guarantor unambiguously does not request credit.

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[3] As noted above, a request for credit can be made directly, or it can be made indirectly by seeking to increase the credit limit on an existing credit plan. 15 U.S.C. § 1691a(b). As we have explained, we certainly do not view executing a guaranty as a *direct* request for credit. And Hawkins and Patterson have not argued that this case involves the sort of "indirect" request recognized under the ECOA.

[4] Hawkins and Patterson also argue that several other circuits have applied § 202.2(e)'s definition of applicant to include guarantors. *See, e.g., Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28 (3d Cir.1995); *Mayes v. Chrysler Credit Corp.*, 37 F.3d 9 (1st Cir.1994). However, these cases applied the regulatory definition without considering whether that definition warranted *Chevron* deference. As such, we do not find those cases to be instructive here.

"Where Congress has manifested its intention, we may not manufacture ambiguity in order to defeat that intent." *Bifulco v. United States*, 447 U.S. 381, 387, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980). Nevertheless, the court went on to assert that "a guarantor does formally approach a creditor in the sense that the guarantor offers up her own personal liability to the creditor if the borrower defaults." *RL BB Acquisition*, 754 F.3d at 385. We find it to be unambiguous that assuming a secondary, contingent liability does not amount to a request for credit. A guarantor engages in different conduct, receives different benefits, and exposes herself to different legal consequences than does a credit applicant. "[T]here is nothing ambiguous about 'applicant' and no way to confuse an applicant with a guarantor." *Moran Foods, Inc. v. Mid-Atlantic Market Dev. Co.*, 476 F.3d 436, 441 (7th Cir.2007) (discussing whether the Federal Reserve's interpretation of applicant to include guarantors warrants *Chevron* deference).[5]

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[5] In *RL BB Acquisition*, the court also observed that the ECOA's separate use of the terms "applicant" and "debtor" in other portions of the statute "suggests that the applicant and the debtor are not always the same person." 754 F.3d at 385. From this, the court inferred that "it would be reasonable to conclude that the applicant could be a third party, such as a guarantor." *Id.* We are not persuaded that the ECOA's distinction between applicants and debtors compels the conclusion that a person can qualify as an applicant without *applying* for credit, that is, without requesting credit. The ECOA's definition of applicant unambiguously does not include guarantors, and we

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Because the text of the ECOA is unambiguous regarding whether a guarantor constitutes an applicant, we will not defer to the Federal Reserve's interpretation of applicant, and we conclude that a guarantor is not protected from marital-status discrimination by the ECOA. Our conclusion also comports with the purposes and policies underlying the ECOA. "The statute was initially designed, at least in part, to curtail the practice of creditors who refused to grant a wife's credit application without a guaranty from her husband." *Mayes v. Chrysler Credit Corp.*, 37 F.3d 9, 11 (1st Cir.1994); *see also Moran Foods,* 476 F.3d at 441 ("[W]hat the Act was intended to do was forbid a creditor to deny credit to a woman on the basis of a belief that she would not be a good credit risk because she would be distracted by child care or some other stereotypically female responsibility."); *Anderson v. United Fin. Co.*, 666 F.2d 1274, 1277 (9th Cir.1982). These policies focus on ensuring fair access to credit by preventing lenders from excluding borrowers from the credit market based on the borrowers' marital status. But the considerations are different in the case of a guarantor. By requesting the execution of a guaranty, a lender does not thereby exclude the guarantor from the lending process or deny the guarantor access to credit. Here, Hawkins and Patterson do not claim that they were excluded from the lending process due to their marital status.

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are not inclined to inject ambiguity into the statute's plain text. *See Bifulco,* 447 U.S. at 387, 100 S.Ct. 2247.

Indeed, they complain that they were improperly *included* in that process by being required to execute guaranties. Thus, we believe that the purposes and policies of the ECOA buttress our interpretation of the statute's plain meaning.[6]

As noted above, Hawkins and Patterson do not argue that they qualify as applicants for any reason other than their status as guarantors. They have not alleged that they participated in the loan-application process, and they have disclaimed having any interest in PHC. Accordingly, we conclude that Hawkins and Patterson are not applicants under the ECOA, and thus Community did not violate the ECOA by requiring them to execute the guaranties. As such, the district court did not err in granting summary judgment in favor of Community on Hawkins and

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[6] We also note that under Missouri law, which governs the loans and guaranties in this case, "co-ownership of property by a husband and wife creates a presumption of tenancy by the entirety." *Lederle v. Lederle*, 916 S.W.2d 423, 429 (Mo.Ct.App.1996). "An execution arising from a judgment against one spouse alone cannot affect property held by a husband and wife as tenants by the entireties." *Wehrheim v. Brent*, 894 S.W.2d 227, 229 (Mo.Ct.App.1995). Thus, it likely was necessary for Hawkins and Patterson to execute their guaranties in order to induce Community to loan $2,000,000 to PHC because Community would then be able to execute on any marital assets in the event of a default. Community's request that Hawkins and Patterson execute guaranties would then have been "sound commercial practice unrelated to any stereotypical view of a wife's role." *Moran*, 476 F.3d at 442.

Patterson's ECOA claim or their ECOA-based affirmative defense.

Finally, because the district court properly granted summary judgment in favor of Community on Hawkins and Patterson's ECOA claim and dismissed Community's counterclaims, this case will not proceed to trial. As such, Hawkins and Patterson's argument that the district court erred in striking their demand for a jury trial is moot.

III. Conclusion

For the foregoing reasons, we affirm.

COLLOTON, Circuit Judge, concurring.

I agree with the court that a guarantor is not an "applicant" within the meaning of 15 U.S.C. § 1691(a). The Federal Reserve Board thus exceeded its authority when it purported to redefine "applicant" in 12 C.F.R. § 202.2(e) to include "guarantors" for purposes of rules relating to when a creditor may require the signature of a spouse or other person on a credit instrument. I add these further reasons for joining the judgment of the court.

The Equal Credit Opportunity Act defines "applicant," in relevant part, as "any person who applies to a creditor for credit." 15 U.S.C. § 1691a(b). The ordinary meaning of "to apply," as understood at the time of the statute's enactment in 1974 and

significant amendment in 1976, is "to make an appeal or a request *usu[ally] for something of benefit to oneself* <~to a bank for a loan>." *Webster's Third New International Dictionary* 105 (1971) (emphasis added). Under that usual meaning, an "applicant" who "applies for credit" is one who requests credit to benefit herself, not credit to benefit a third party. That there are unusual meanings of "apply" that encompass making a request on behalf of another is not sufficient to make a term ambiguous for purposes of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Analysis under the first step of *Chevron* to determine whether the statutory text is unambiguous begins with ordinary meaning. *Carcieri v. Salazar*, 555 U.S. 379, 388, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009).

The context of the ECOA confirms that Congress employed the ordinary meaning of "apply" in the phrase "applies for credit." The statute contemplates a first-party applicant who requests credit to benefit herself. Section 1691(d)(1) directs that within thirty days "after receipt of a completed application for credit, a creditor shall notify *the applicant* of its action on the application." (emphasis added). The statute's use of the definite article shows that the applicant is the single person to whom credit would be extended, not a third party asking on behalf of the putative debtor. *See also* S.Rep. No. 94-589, at 7-10 (1976), 1976 U.S.C.C.A.N. 403. Similarly, the statute as amended in 1991 refers to a creditor taking action

in connection with "the applicant's application for a loan," 15 U.S.C. § 1691(e)(1), and it would be unnatural to conclude that a third party who offers a promise in support of an application thereby submits what the statute describes as an "application for a loan," *id.*, and a "completed application for credit," *id.* § 1691(d)(1).

The statute defines "adverse action" on a credit application, but excludes from that phrase "a refusal to extend additional credit *under an existing credit arrangement where the applicant is delinquent or otherwise in default.*" 15 U.S.C. § 1691(d)(6) (emphasis added). This provision confirms that "the applicant" is the person to whom credit is extended and who is responsible for making payments on an existing loan. A guarantor or other third-party requestor does not in ordinary usage become "delinquent" or "in default" on a loan or other existing credit arrangement. But if a guarantor could be an "applicant," then the creditor's refusal to extend additional credit to a delinquent borrower would be an "adverse action" on the *guarantor's* "application," thus entitling the third-party guarantor to a statement of reasons that the creditor need not furnish to the first-party applicant. *Id.* § 1691(d)(2). This is not a natural reading of the text.

The statute specifically envisions the involvement of a third party who requests an extension of credit to a first-party applicant, but distinguishes between the third-party requestor and the "applicant": "Where a creditor has been *requested by a third*

party to make a specific extension of credit directly or indirectly *to an applicant*, the notification and statement of reasons required by this subsection may be made directly by such creditor, or indirectly *through the third party*, provided in either case that the identity of the creditor is disclosed." *Id.* § 1691(d)(4) (emphases added). Again, the statutory text confirms that the "applicant" is the party to whom credit will be extended. When ordinary meaning aligns with the natural reading of a term in the context of a statute, there is no ambiguity that gives an agency license to adopt an alternative definition. *Carcieri*, 555 U.S. at 388-90, 129 S.Ct. 1058.

The regulators seemed to recognize the plain meaning of "applicant" in the first decade after the ECOA was enacted. The Board solicited comment in 1976 about the meaning of "applicant," Equal Credit Opportunity, 41 Fed.Reg. 29,870, 29,871 (proposed July 20, 1976), but "to resolve confusion about the scope of this term," the Board specifically provided that "a guarantor, surety, endorser, or similar party" is *not* an applicant. Equal Credit Opportunity, 41 Fed.Reg. 49,123, 49,124, 49,132 (proposed Nov. 8, 1976). As the Board acknowledged, the unadorned statutory definition of "applicant" was sufficient to forbid a creditor to require the signature of a guarantor on a discriminatory basis. *Id.* at 49,124. If a creditworthy married person applies for credit, and the creditor demands based solely on marital status that her or his spouse sign a guaranty as a condition of extending credit, then the creditor has violated the

statute and regulations, and the married applicant has a cause of action against the creditor as an "aggrieved applicant." 15 U.S.C. § 1691e(a).

The Board's effort to "redefine 'applicant' to include guarantors" apparently was motivated by dissatisfaction with Congress's decision to limit the cause of action under the ECOA to an "aggrieved *applicant.*" *See* Equal Credit Opportunity; Revision of Regulation B; Official Staff Commentary, 50 Fed.Reg. 10,890, 10,891, 10,896 (proposed Mar. 18, 1985). The regulators observed that if a creditor illegally required a spouse to sign a guaranty as a condition of extending credit to an applicant, then only the applicant – not the guarantor – had "standing to sue" as an "aggrieved applicant." *Id.* at 10,891; *see also* Equal Credit Opportunity; Revision of Regulation B; Official Staff Commentary, 50 Fed.Reg. 48,018, 48,020 (Nov. 20, 1985). The redefinition of "applicant" in 12 C.F.R. § 202.2(e) to include "guarantors" was designed to give guarantors independent standing to sue. The Board believed that allowing guarantors to bring suit would have the effect of "enhancing protections," although the Board also thought "guarantors, if they have standing to sue, would merely join in the lawsuit" brought by "applicants" in the normal case. 50 Fed.Reg. at 48,025.

Whatever might be the salutary effects of the change in policy, it was not a choice for the Board to make. Congress opted to limit the cause of action to an "aggrieved applicant," and the statute gave "applicant" its ordinary meaning of one who applies for

credit to benefit oneself. Any decision to expand the civil liability of creditors and to provide a cause of action for guarantors must come from Congress.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

VALERIE J. HAWKINS and JANICE A. PATTERSON,	)	
Plaintiffs,	)	
v.	)	No. 12-CV-00670-DW
COMMUNITY BANK OF RAYMORE,	)	
Defendant.	)	

ORDER

(Filed May 16, 2013)

Pending before the Court is the Defendant Community Bank of Raymore' s (the "Defendant") Motion for Summary Judgment (the "Motion"). See Doc. 34. The Defendant filed suggestions in support of the Motion (Doc. 35), the Plaintiffs Valerie Hawkins and Janice Patterson (the "Plaintiffs") filed suggestions in opposition (Doc. 50), and the Defendant filed a reply brief (Doc. 64). As explained below, the Court finds that the Plaintiffs, as guarantors, are not "applicants" for credit as defined by the Equal Credit Opportunity Act ("ECOA"). Therefore, the Plaintiffs' ECOA claims fail as a matter of law and the Motion is GRANTED.

I.

Unless otherwise noted, the following facts are undisputed and only those facts necessary to resolve the Motion are discussed below. The Defendant made four separate loans to PHC Development, LLC ("PHC") in the principal amount of $2,077,900. The loans were made in connection with PHC's acquisition and development of a residential facility known as the Fox's Den Subdivision in Peculiar, Missouri. The loans were issued, modified, extended, and/or renewed on numerous occasions. Both Plaintiffs personally guaranteed repayment of the four loans to PHC, as did their husbands, Gary A. Hawkins ("Gary") and Chris L. Patterson ("Chris").

On or about April 16, 2012, the Defendant declared that the loans to PHC were in default, and demanded payment from PHC, both Plaintiffs, Gary, and Chris. The Plaintiffs filed this suit on May 31, 2012. The Plaintiffs allege that the Defendant required them to sign the guaranties simply because they were married to Gary and Chris. By imposing this requirement, the Plaintiffs allege that the Defendant "discriminated against [them] on the basis of marital status. Such acts constituted a violation of the ECOA, 15 U.S.C. § 1691(a) and of Regulation B, 12 C.F.R. § 202.7." Complaint, at ¶ 54. Among other claims, the Defendant has filed counterclaims for breach of the guaranties.

II.

Summary judgment is warranted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Sensient Tech. Corp. v. SensoryEffects Flavor Co., 613 F.3d 754, 760 (8th Cir. 2010) (citations and quotations omitted). If the moving party makes this showing, "the nonmoving party must set forth specific facts sufficient to raise a genuine issue for trial and cannot rest on allegations in the pleadings." Ryan v. Capital Contractors, Inc., 679 F.3d 772, 776 (8th Cir. 2012) (citations and quotations omitted). A genuine issue of material fact exists if a "reasonable jury could return a verdict for the non-moving party." Smith v. Hy-Vee, Inc., 622 F.3d 904, 907 (8th Cir. 2010).

III.

The pending Motion is for summary judgment, but its resolution turns on a legal, not factual issue. That issue is whether the ECOA applies to guarantors such as the Plaintiffs. If it does not, then the Defendant is entitled to summary judgment. This issue is addressed below.

Prior to enactment of the ECOA, creditors traditionally refused to extend individual credit to married women. See Anderson v. United Fin. Co., 666 F.2d 1274, 1277 (9th Cir. 1982). This refusal was based on

the wrongful "belief that [women] would not be a good credit risk because [they] would be distracted by child care or some other stereotypically female responsibility." Moran Foods, Inc. v. Mid-Atlantic Market Dev. Co., LLC, 476 F.3d 436, 441 (7th Cir. 2007). The ECOA was thus enacted in part to "eradicate credit discrimination waged against women, especially married women whom creditors traditionally refused to consider for individual credit." Midkiff v. Adams Cnty. Reg'l Water Dist., 409 F.3d 758, 771 (6th Cir. 2005) (citations and quotations omitted).

The ECOA provides that "It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction on the basis of sex or marital status." 15 U.S.C. § 1691(a)(1). An "applicant" is defined as "any person **who applies to a creditor directly for** an extension, renewal, or continuation of **credit.** ." 15 U.S.C. § 1691 a(b) (emphasis supplied). Based on this statutory language, the Defendant argues that the ECOA does not apply here because the Plaintiffs were guarantors, not applicants.

In response, the Plaintiffs argue that they meet the definition of "applicant" as later defined by the Board of Governors of the Federal Reserve System (the "FRB"). Specifically, the FRB promulgated Regulation B which defines an "applicant" as "includ[ing] any person who is or may become contractually liable regarding an extension of credit. For purposes of

§ 202.7(d), the term includes guarantors, sureties, endorsers, and similar parties." 12 C.F.R. § 202.2(e).[1] Under 12 C.F.R. § 202.7(d)(1), "a creditor shall not require the signature of an applicant's spouse or other person if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested." Therefore, although the ECOA focuses on applicants for credit, Regulation B extends the statute to guarantors of credit.

This extension has created a split in the case law, and the Eighth Circuit Court of Appeals has not directly addressed the issue. Relying primarily on Regulation B, some courts have extended the ECOA to guarantors. See, e.g., Citgo Petroleum Corp. v. Bulk Petroleum Corp., 2010 WL 3931496, at * 9 (N.D. Okla. Oct. 5, 2010) ("This Court adheres to Regulation B, such that guarantors who are required to sign a guaranty in connection with an extension of credit covered by the ECOA will continue to receive protection."). Relying primarily on the statutory definition of "applicant," other courts have found that the ECOA does not apply to guarantors. See, e.g., Champion Bank v. Reg'l Dev., LLC, 2009 WL 1351122, at * 2-3 (E.D. Mo. May 13, 2009).

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[1] The ECOA authorizes the FRB to promulgate regulations such as Regulation B. 15 U.S.C. § 1691b(a); Moran Foods, Inc., 476 F.3d at 441.

After reviewing the ECOA, Regulation B, and the applicable case law, this Court holds that a guarantor is not an "applicant" as defined by the ECOA. As recently summarized by Judge Kays:

> The text of the law states the statute's purpose is to eradicate credit discrimination waged against women, especially married women whom creditors traditionally refused to consider for individual credit. The statute prohibits discrimination, such as denying credit or offering credit on less favorable terms, on the basis of a woman's marital status. But by sweeping guarantors into the statute, the regulation expands the ECOA beyond its intended purpose and leads to circular and illogical results in cases such as the present one, where a married woman is not being denied anything and is simply guaranteeing her spouse's business loan. An applicant is not akin to a guarantor, and interpreting applicant as embracing guarantor opens vistas of liability beyond that intended by Congress.

Smithville 169 v. Citizens Bank & Trust Co., 2013 WL 434044, at * 3 (W.D. Mo. Feb. 5, 2013) (citations and quotations omitted).

The Court agrees with this analysis and adopts its reasoning in full. The Plaintiffs here were not applicants for credit as defined by the ECOA. Instead, they were guarantors, and "a guarantor does not, by definition, apply for anything." Champion Bank, 2009 WL 1351122, at * 2. Furthermore, Regulation B is not

entitled to deference because the statutory language is clear. See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984); Moran Foods, Inc., 476 F.3d at 441 ("But there is nothing ambiguous about 'applicant' and no way to confuse an applicant with a guarantor."). For these reasons, and for the additional reasons stated by the Defendant, the Plaintiffs' claims under the ECOA must be dismissed as a matter of law.

IV.

It is hereby ORDERED that:

(1) the Defendant Community Bank of Raymore's Motion for Summary Judgment (Doc. 34) is GRANTED; and

(2) the Plaintiffs' claims against Defendant are DISMISSED WITH PREJUDICE; and

(3) the Plaintiffs' Affirmative Defense Number 21 to the Defendant's Amended Counterclaims[2] is STRUCK.

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[2] The Defendant moved for summary judgment on Plaintiffs' Affirmative Defense No. 20. Affirmative Defense No. 20, however, asserts that "Defendant's claims are barred by the doctrine of unclean hands." See Doc. 61, at ¶ 265. It is Affirmative Defense No. 21 that relates to alleged marital discrimination under the ECOA.

IT IS SO ORDERED.

Date: May 17, 2013

/s/ Dean Whipple
Dean Whipple
United States
District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

VALERIE J. HAWKINS, et al.,	)	
Plaintiffs,	)	
v.	)	No. 12-CV-00670-DW
COMMUNITY BANK OF RAYMORE,	)	
Defendant.	)	

ORDER

(Filed Aug. 30, 2013)

Pending before the Court is the Plaintiff Valerie J. Hawkins and Janice A. Patterson's (the "Plaintiffs") Suggestions in Support of Dismissal of Defendant's Counterclaims Pursuant to 28 U.S.C. § 1367(c)(3), and the Defendant Community Bank of Raymore's (the "Bank") Brief Regarding Supplemental Jurisdiction. See Docs. 101, 102. The only remaining claims in this case are state law counterclaims asserted by the Bank, and the parties are not diverse. Consequently, and as explained below, the Bank's counterclaims are DISMISSED WITHOUT PREJUDICE.

I.

Only those facts necessary to resolve the supplemental jurisdiction issue are discussed below, and

those facts are simplified to the extent possible. The following facts are primarily taken from the parties' briefs and exhibits, as well as prior Orders issued in this case, without further quotation or attribution unless otherwise noted.

The Plaintiffs filed this action against the Bank on May 31, 2012. See Doc. 1, Complaint ("Compl."). The Complaint alleges that the Court has original subject matter jurisdiction under "28 U.S.C. § 1331 because this matter arises out of Federal law under 15 U.S.C. § 1691(a) and 12 C.F.R. § 202.7." Compl. at ¶ 4. The Plaintiffs asserted a single claim under the federal Equal Credit Opportunity Act (the "ECOA"). See 15 U.S.C. § 1691(a). The Plaintiffs alleged that the Bank required them to sign certain guaranties simply because of their marital status. By imposing this requirement, the Plaintiffs alleged that the Bank "discriminated against [them] on the basis of marital status. Such acts constituted a violation of the ECOA, 15 U.S.C. § 1691(a) and of Regulation B, 12 C.F.R. § 202.7." Compl., at ¶ 54.

The Bank responded by filing a Counterclaim. See Doc. 40, First Amended Counterclaim ("Counterclaim"). The Counterclaim alleges that the Court "has subject matter jurisdiction over this action under 28 U.S.C. § 1331 and [supplemental jurisdiction under] 28 U.S.C. § 1367(a)." Counterclaim, ¶ 4. In total, the Bank asserts six separate counterclaims, and they all arise under state law. Count I asserts a claim against the Plaintiff Janice Patterson for breaching her guaranties. Count II asserts a claim against the

Plaintiff Valerie Hawkins for breaching her guaranties. The remaining four counts assert fraudulent and negligent misrepresentation claims against the Plaintiffs.

On March 6, 2013, the Plaintiffs filed their Reply to the Bank's Counterclaim. See Doc. 61. In their Reply, the Plaintiffs "admit that the United States District Court has subject matter jurisdiction over Plaintiffs' asserted action, but deny that this Court has subject matter jurisdiction over [the Bank's] Amended Counterclaims." Id., ¶ 3. In an Order dated May 17, 2013, the Court granted the Bank's motion for summary judgment and dismissed the Plaintiffs' federal claims with prejudice. See Doc. 68.

Therefore, only the Bank's state law counterclaims remain pending. In addition, the parties are not completely diverse as all are residents of Missouri. Compl., ¶¶ 1-3; Counterclaim, ¶¶ 1-3; 28 U.S.C. § 1332. As a result – and after reviewing the parties' briefs regarding related state court cases (Docs. 72, 78, 80) – the Court ordered both parties to file a brief on whether it should exercise supplemental jurisdiction over the counterclaims. The Plaintiffs' brief argues that the Court should not exercise supplemental jurisdiction; the Bank argues that it should. As explained below, the Court agrees with the Plaintiffs.

II.

It is axiomatic that federal courts are courts of limited jurisdiction. Arkansas Blue Cross & Blue Shield v. Little Rock Cardiology Clinic, P.A., 551 F.3d 812, 816 (8th Cir. 2009). In general, federal courts only have original jurisdiction over (1) cases involving a federal question; and (2) cases in which the parties are diverse and where the amount in controversy exceeds $75,000. See 28 U.S.C. § 1331 (providing for federal question jurisdiction); 28 U.S.C. § 1332(a) (providing for diversity jurisdiction).

In this case, original jurisdiction was based on federal question jurisdiction because the Plaintiffs asserted a claim arising under federal law. See 28 U.S.C. § 1331; § 15 U.S.C. § 1691(a). As stated above, that federal claim has been dismissed with prejudice. The only remaining claims are the Bank's counterclaims that arise under state law. Consequently, original jurisdiction is lacking because there are no pending claims arising under federal law, and because the parties are not diverse. See 28 U.S.C. §§ 1331, 1332.

Therefore, the issue is whether the Court should exercise supplemental jurisdiction over the Bank's state law counterclaims. The exercise of supplemental jurisdiction is discretionary and may be declined if:

> (1) the claim raises a novel or complex issue of State law,

> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c)(1)-(4). For two primary reasons, the Court declines exercising supplemental jurisdiction in this case.

First, "Congress unambiguously gave district courts discretion in 28 U.S.C. § 1367(c) to dismiss supplemental state law claims when all federal claims have been dismissed." Gibson v. Weber, 431 F.3d 339, 342 (8th Cir. 2005). As explained by the Supreme Court, "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine will point toward declining to exercise jurisdiction over the remaining state-law claims." Missouri Roundtable for Life v. Carnahan, 676 F.3d 665, 678 (8th Cir. 2012) (quoting Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988)). In part, this is because federal courts should "exercise judicial restraint and avoid state law issues wherever possible." Thomas v. Dickel, 213 F.3d 1023, 1026 (8th Cir. 2000) (affirming district court's decision to decline

supplemental jurisdiction) (citations and quotations omitted).

Here, the Court finds that a Missouri state court should resolve the Bank's counterclaims that arise under state law and involve Missouri residents. Stated differently, "[o]ut of respect for the principles of federalism and for the courts of the State of [Missouri], the Court will exercise its discretion under section 1367(c)[3] to decline supplemental jurisdiction with respect to [the Bank's] state-law claims." Graham v. Entergy Arkansas, Inc., 2011 WL 4963026, at * 5 (E.D. Ark. Oct. 19, 2011).

Second, the Bank's counterclaims "substantially predominate[ ] over the claim or claims over which the district court has original jurisdiction." 28 U.S.C. § 1367(c)(2). The federal claim brought by the Plaintiffs was relatively straightforward and narrow in scope. In contrast, the Bank's six separate counterclaims dramatically expand the scope of this litigation and substantially predominate over that federal claim.

In particular, the Plaintiffs' Complaint is 13 pages long and only asserts a claim under ECOA and related federal regulations. The Bank's Counterclaim is 46 pages long and asserts six separate claims for breach of the guaranties, fraud, and negligent misrepresentation. Because those claims substantially predominate over the Plaintiffs' ECOA claim, the Court declines to exercise supplemental jurisdiction over them. See Morris v. Blue Sky Mgmnt., LLC, 2012

WL 527936, at * 5 (W.D. Mo. Feb. 16, 2012) (declining supplemental jurisdiction in part because the defendant's "state law counterclaims could predominate over [p]laintiff's [federal] claims").

The Bank argues that dismissal would waste the resources already expended by the parties and the Court. Doc. 101, p. 2-5. This argument is not supported by the record or the posture of this and a related state court case. With respect to the parties' resources, discovery produced in this case may be used in related state actions or in a subsequently-filed case. Indeed, at the beginning of this case, the parties agreed that "[i]t is the parties['] intention, to the extent possible, to conduct discovery in this and the related state court actions concurrently for use in this and the related state court actions." Doc. 11, p. 4. Moreover, with minor revisions, documents prepared for this case – including the Bank's motion for summary judgment – can be refiled in state court. See, e.g., C&J Mgmt. Corp. v. Anderson, 707 F. Supp. 2d 858, 864 (S.D. Iowa 2009) (dismissing state law claims in part because "the Court does not foresee a significant inconvenience to the parties if Plaintiffs refile their state claims in state court since their work, to date, can be directly applied in a state court action").

Judicial economy would also be served by dismissal of this case. This is because the parties have asserted related claims and defenses in this Court and in state court. See Docs. 72, 78, 80. Specifically, shortly after this case was filed, PHC Development,

LLC ("PHC") and the Plaintiffs' husbands filed a lawsuit against the Bank in the Circuit Court of Cass County, Missouri (the "PHC State Action"). See Case No. 12CA-CV01932. In the PHC State Action, the Bank filed counterclaims against PHC and the Plaintiffs' husbands for breach of promissory notes and guaranties that are related to the Bank's counterclaims in this case.

In both this case and in the PHC State Action, the Plaintiffs, their husbands, and PHC raise many of the same factual and legal defenses to the Bank's counterclaims. Compare, e.g., Doc. 61, ¶¶ 154-180 with Doc. 72-15, ¶¶ 183-210. By way of just one example, PHC, the Plaintiffs, and their husbands claim that "The Bank cannot breach the agreements with the PHC Development Parties, interfere with the PHC Development Parties' performance, and then declare a default so as to sue [Plaintiffs, their husbands, and PHC] for money. The Bank's prior material breach excused [them] of their performance under their alleged Guaranties [and other agreements]. Doc. 61, ¶ 185; Doc. 72-15, ¶ 213.[1] There is a clear overlap of factual and legal issues in both this case and in the

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[1] In the PHC State Action, the Bank also asserts fraudulent and negligent misrepresentation counterclaims against the Plaintiffs' husbands that are strikingly similar to the tort claims asserted against Plaintiffs in this case. Compare Doc. 40, p. 23-44 with Doc. 72-11, p. 10-33. This further demonstrates the similarities between these cases, and also demonstrates that documents prepared for this case may be reused in subsequent state proceedings.

PHC State Action. See Docs. 70, 72, 78-81.[2] Dismissal will promote judicial economy because two courts will not be considering similar facts, defenses, and legal issues. Dismissal will also prevent inconsistent results arising from those separate proceedings.

III.

For the foregoing reasons, the Court declines to exercise supplemental jurisdiction over the state law counterclaims. Consequently, it is hereby ORDERED that the Community Bank of Raymore's First Amended Counterclaim (Doc. 40) is DISMISSED WITHOUT PREJUDICE. The Bank is entitled to refile its claims in state court in accordance with the tolling provision set forth in 28 U.S.C. § 1367(d).[3] The Clerk of Court is directed to terminate any pending motions, and to then mark this case as closed.

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[2] To the extent dismissal would cause any unfairness or other undesirable consequences, those results are a product of the parties' decision to simultaneously litigate similar facts and claims in separate forums. Indeed, the Court would have raised the issue of supplemental jurisdiction earlier had it been fully apprised of the substantial similarities between the pending cases. For these reasons, the Court also finds that the pending state court cases provide a "compelling reason[ ] for declining jurisdiction." 28 U.S.C. § 1367(c)(4).

[3] "The tolling provision of section 1367(d) provides 'assurance that state-law claims asserted under § 1367(a) will not become time barred while pending in federal court.'" Frazier v. Nebraska Dep't of Correctional Serv., WL 2005 WL 1252200, at * 2 (D. Neb. May 24, 2005) (quoting Jinks v. Richland Cnty., 538 U.S. 456, 464 (2003)).

IT IS SO ORDERED.

Date: August 30, 2013

/s/ Dean Whipple
Dean Whipple
United States
District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

JUDGMENT IN A CIVIL CASE

VALERIE HAWKINS, et al., Plaintiff,	)	
vs.	)	Case No. 12-00670-CV-W-DW
COMMUNITY BANK OF RAYMORE, Defendant.	)	

____ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ **Decision by Court.** The issues have been considered and a decision has been rendered by the Court.

IT IS ORDERED AND ADJUDGED that the Community Bank of Raymore's First Amended Counterclaim (Doc. 40) is DISMISSED WITHOUT PREJUDICE.

ANN THOMPSON
Clerk of Court

Date: September 6, 2013 /s/ Terri Moore
(by) Terri Moore,
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

AMENDED JUDGMENT IN A CIVIL CASE

VALERIE HAWKINS, et al., Plaintiff,	)	
vs.	)	Case No. 12-00670-CV-W-DW
COMMUNITY BANK OF RAYMORE, Defendant.	)	

____ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ **Decision by Court.** The issues have been considered and a decision has been rendered by the Court.

IT IS ORDERED AND ADJUDGED that the Defendant Community Bank of Raymore's First Amended Counterclaim (Doc. 40) is DISMISSED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED AND ADJUDGED that pursuant to this Court's order of May 16, 2013 that Defendant Community Bank of Raymore's Motion for Summary Judgment (Doc. 34) is GRANTED; (2) the Plaintiffs' claims against Defendant are DISMISSED WITH PREJUDICE; and (3) the Plaintiffs' Affirmative Defense Number

21 to the Defendant's Amended Counterclaims is STRUCK.

ANN THOMPSON
Clerk of Court

Date: September 10, 2013 /s/ Terri Moore
(by) Terri Moore,
Deputy Clerk

RELEVANT STATUTES AND REGULATIONS

15 U.S.C. § 1691

Scope of prohibition

(a) Activities constituting discrimination

It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction –

(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);

(2) because all or part of the applicant's income derives from any public assistance program; or

(3) because the applicant has in good faith exercised any right under this chapter.

(b) Activities not constituting discrimination

It shall not constitute discrimination for purposes of this subchapter for a creditor –

(1) to make an inquiry of marital status if such inquiry is for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit and not to discriminate in a determination of credit-worthiness;

(2) to make an inquiry of the applicant's age or of whether the applicant's income derives from any public assistance program if such inquiry is for the purpose of determining the amount and probable continuance of income levels, credit history, or other pertinent element of

credit-worthiness as provided in regulations of the Bureau;

(3) to use any empirically derived credit system which considers age if such system is demonstrably and statistically sound in accordance with regulations of the Bureau, except that in the operation of such system the age of an elderly applicant may not be assigned a negative factor or value;

(4) to make an inquiry or to consider the age of an elderly applicant when the age of such applicant is to be used by the creditor in the extension of credit in favor of such applicant; or

(5) to make an inquiry under section 1691c-2 of this title, in accordance with the requirements of that section.

(c) Additional activities not constituting discrimination

It is not a violation of this section for a creditor to refuse to extend credit offered pursuant to –

(1) any credit assistance program expressly authorized by law for an economically disadvantaged class of persons;

(2) any credit assistance program administered by a nonprofit organization for its members or an economically disadvantaged class of persons; or

(3) any special purpose credit program offered by a profit-making organization to meet special social needs which meets standards prescribed in regulations by the Bureau;

if such refusal is required by or made pursuant to such program.

(d) Reason for adverse action; procedure applicable; "adverse action" defined

(1) Within thirty days (or such longer reasonable time as specified in regulations of the Bureau for any class of credit transaction) after receipt of a completed application for credit, a creditor shall notify the applicant of its action on the application.

(2) Each applicant against whom adverse action is taken shall be entitled to a statement of reasons for such action from the creditor. A creditor satisfies this obligation by –

(A) providing statements of reasons in writing as a matter of course to applicants against whom adverse action is taken; or

(B) giving written notification of adverse action which discloses (i) the applicant's right to a statement of reasons within thirty days after receipt by the creditor of a request made within sixty days after such notification, and (ii) the identity of the person or office from which such statement may be obtained. Such statement may be given orally if the written notification advises the applicant of his right to have the statement of reasons confirmed in writing on written request.

(3) A statement of reasons meets the requirements of this section only if it contains the specific reasons for the adverse action taken.

(4) Where a creditor has been requested by a third party to make a specific extension of credit directly or indirectly to an applicant, the notification and statement of reasons required by this subsection may be made directly by such creditor, or indirectly through the third party, provided in either case that the identity of the creditor is disclosed.

(5) The requirements of paragraph (2), (3), or (4) may be satisfied by verbal statements or notifications in the case of any creditor who did not act on more than one hundred and fifty applications during the calendar year preceding the calendar year in which the adverse action is taken, as determined under regulations of the Bureau.

(6) For purposes of this subsection, the term "adverse action" means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.

(e) Copies furnished to applicants

(1) In general

Each creditor shall furnish to an applicant a copy of any and all written appraisals and valuations developed in connection with the applicant's

application for a loan that is secured or would have been secured by a first lien on a dwelling promptly upon completion, but in no case later than 3 days prior to the closing of the loan, whether the creditor grants or denies the applicant's request for credit or the application is incomplete or withdrawn.

(2) Waiver

The applicant may waive the 3 day requirement provided for in paragraph (1), except where otherwise required in law.

(3) Reimbursement

The applicant may be required to pay a reasonable fee to reimburse the creditor for the cost of the appraisal, except where otherwise required in law.

(4) Free copy

Notwithstanding paragraph (3), the creditor shall provide a copy of each written appraisal or valuation at no additional cost to the applicant.

(5) Notification to applicants

At the time of application, the creditor shall notify an applicant in writing of the right to receive a copy of each written appraisal and valuation under this subsection.

(6) Valuation defined

For purposes of this subsection, the term "valuation" shall include any estimate of the value of a dwelling developed in connection with a creditor's

decision to provide credit, including those values developed pursuant to a policy of a government sponsored enterprise or by an automated valuation model, a broker price opinion, or other methodology or mechanism.

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15 U.S.C. § 1691a

Definitions; rules of construction

(a) The definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "applicant" means any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit.

(c) The term "Bureau" means the Bureau of Consumer Financial Protection.

(d) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.

(e) The term "creditor" means any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.

(f) The term "person" means a natural person, a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.

(g) Any reference to any requirement imposed under this subchapter or any provision thereof includes reference to the regulations of the Bureau under this subchapter or the provision thereof in question.

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15 U.S.C. § 1691b

Promulgation of regulations by the bureau

(a) The Bureau shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain but are not limited to such classifications, differentiation, or other provision, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith.

(b) Such regulations may exempt from the provisions of this subchapter any class of transactions that are not primarily for personal, family, or household purposes, or business or commercial loans made available by a financial institution, except that a particular type within a class of such transactions may be exempted if the Bureau determines, after

making an express finding that the application of this subchapter or of any provision of this subchapter of such transaction would not contribute substantially to effecting the purposes of this subchapter.

(c) An exemption granted pursuant to subsection (b) shall be for no longer than five years and shall be extended only if the Bureau makes a subsequent determination, in the manner described by such paragraph, that such exemption remains appropriate.

(d) Pursuant to Bureau regulations, entities making business or commercial loans shall maintain such records or other data relating to such loans as may be necessary to evidence compliance with this subsection or enforce any action pursuant to the authority of this chapter. In no event shall such records or data be maintained for a period of less than one year. The Bureau shall promulgate regulations to implement this paragraph in the manner prescribed by chapter 5 of Title 5.

(e) The Bureau shall provide in regulations that an applicant for a business or commercial loan shall be provided a written notice of such applicant's right to receive a written statement of the reasons for the denial of such loan.

(f) Board Authority

Notwithstanding subsection (a), the Board shall prescribe regulations to carry out the purposes of this subchapter with respect to a person described in section 5519(a) of Title 12. These regulations may

contain but are not limited to such classifications, differentiation, or other provision, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith.

(g) Deference

Notwithstanding any power granted to any Federal agency under this subchapter, the deference that a court affords to a Federal agency with respect to a determination made by such agency relating to the meaning or interpretation of any provision of this subchapter that is subject to the jurisdiction of such agency shall be applied as if that agency were the only agency authorized to apply, enforce, interpret, or administer the provisions of this subchapter.

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15 U.S.C. § 1691e

Civil liability

(a) Individual or class action for actual damages

Any creditor who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class.

(b) Recovery of punitive damages in individual and class action for actual damages; exemptions; maximum amount of punitive damages in individual actions; limitation on total recovery in class actions; factors determining amount of award

Any creditor, other than a government or governmental subdivision or agency, who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for punitive damages in an amount not greater than $10,000, in addition to any actual damages provided in subsection (a) of this section, except that in the case of a class action the total recovery under this subsection shall not exceed the lesser of $500,000 or 1 per centum of the net worth of the creditor. In determining the amount of such damages in any action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

(c) Action for equitable and declaratory relief

Upon application by an aggrieved applicant, the appropriate United States district court or any other court of competent jurisdiction may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this subchapter.

(d) Recovery of costs and attorney fees

In the case of any successful action under subsection (a), (b), or (c) of this section, the costs of the action, together with a reasonable attorney's fee as determined by the court, shall be added to any damages awarded by the court under such subsection.

(e) Good faith compliance with rule, regulation, or interpretation of Bureau or interpretation or approval by an official or employee of Bureau of Consumer Financial Protection duly authorized by Bureau

No provision of this subchapter imposing liability shall apply to any act done or omitted in good faith in conformity with any official rule, regulation, or interpretation thereof by the Bureau or in conformity with any interpretation or approval by an official or employee of the Bureau of Consumer Financial Protection duly authorized by the Bureau to issue such interpretations or approvals under such procedures as the Bureau may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(f) Jurisdiction of courts; time for maintenance of action; exceptions

Any action under this section may be brought in the appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction. No such action shall

be brought later than 5 years after the date of the occurrence of the violation, except that –

(1) whenever any agency having responsibility for administrative enforcement under section 1691c of this title commences an enforcement proceeding within 5 years after the date of the occurrence of the violation,

(2) whenever the Attorney General commences a civil action under this section within 5 years after the date of the occurrence of the violation,

then any applicant who has been a victim of the discrimination which is the subject of such proceeding or civil action may bring an action under this section not later than one year after the commencement of that proceeding or action.

(g) Request by responsible enforcement agency to Attorney General for civil action

The agencies having responsibility for administrative enforcement under section 1691c of this title, if unable to obtain compliance with section 1691 of this title, are authorized to refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted. Each agency referred to in paragraphs (1), (2), and (9) of section 1691c(a) of this title shall refer the matter to the Attorney General whenever the agency has reason to believe that 1 or more creditors has engaged in a pattern or practice of discouraging or denying applications for credit in violation of section 1691(a) of this title. Each such agency may refer the matter to the Attorney General

whenever the agency has reason to believe that 1 or more creditors has violated section 1691(a) of this title.

(h) Authority for Attorney General to bring civil action; jurisdiction

When a matter is referred to the Attorney General pursuant to subsection (g) of this section, or whenever he has reason to believe that one or more creditors are engaged in a pattern or practice in violation of this subchapter, the Attorney General may bring a civil action in any appropriate United States district court for such relief as may be appropriate, including actual and punitive damages and injunctive relief.

(i) Recovery under both subchapter and fair housing enforcement provisions prohibited for violation based on same transaction

No person aggrieved by a violation of this subchapter and by a violation of section 3605 of Title 42 shall recover under this subchapter and section 3612 of Title 42, if such violation is based on the same transaction.

(j) Discovery of creditor's granting standards

Nothing in this subchapter shall be construed to prohibit the discovery of a creditor's credit granting standards under appropriate discovery procedures in the court or agency in which an action or proceeding is brought.

(k) Notice to HUD of violations

Whenever an agency referred to in paragraph (1), (2), or (3) of section 1691c(a) of this title –

(1) has reason to believe, as a result of receiving a consumer complaint, conducting a consumer compliance examination, or otherwise, that a violation of this subchapter has occurred;

(2) has reason to believe that the alleged violation would be a violation of the Fair Housing Act [42 U.S.C.A. § 3601 et seq.]; and

(3) does not refer the matter to the Attorney General pursuant to subsection (g) of this section,

the agency shall notify the Secretary of Housing and Urban Development of the violation, and shall notify the applicant that the Secretary of Housing and Urban Development has been notified of the alleged violation and that remedies for the violation may be available under the Fair Housing Act.

12 C.F.R. § 202.2

Definitions.

For the purposes of this regulation, unless the context indicates otherwise, the following definitions apply.

(a) Account means an extension of credit. When employed in relation to an account, the word use refers only to open-end credit.

(b) Act means the Equal Credit Opportunity Act (title VII of the Consumer Credit Protection Act).

(c) Adverse action.

(1) The term means:

(i) A refusal to grant credit in substantially the amount or on substantially the terms requested in an application unless the creditor makes a counteroffer (to grant credit in a different amount or on other terms) and the applicant uses or expressly accepts the credit offered;

(ii) A termination of an account or an unfavorable change in the terms of an account that does not affect all or substantially all of a class of the creditor's accounts; or

(iii) A refusal to increase the amount of credit available to an applicant who has made an application for an increase.

(2) The term does not include:

(i) A change in the terms of an account expressly agreed to by an applicant.

(ii) Any action or forbearance relating to an account taken in connection with inactivity, default, or delinquency as to that account;

(iii) A refusal or failure to authorize an account transaction at point of sale or loan, except when the refusal is a termination or an unfavorable change in the terms of an account that does not affect all or substantially all of a class of the creditor's accounts, or when the refusal is a denial of an application for an increase in the amount of credit available under the account;

(iv) A refusal to extend credit because applicable law prohibits the creditor from extending the credit requested; or

(v) A refusal to extend credit because the creditor does not offer the type of credit or credit plan requested.

(3) An action that falls within the definition of both paragraphs (c)(1) and (c)(2) of this section is governed by paragraph (c)(2) of this section.

(d) Age refers only to the age of natural persons and means the number of fully elapsed years from the date of an applicant's birth.

(e) Applicant means any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of credit. For purposes of § 202.7(d), the term includes guarantors, sureties, endorsers, and similar parties.

(f) Application means an oral or written request for an extension of credit that is made in accordance with procedures used by a creditor for the type of credit requested. The term application does not include the use of an account or line of credit to obtain an amount of credit that is within a previously established credit limit. A completed application means an application in connection with which a creditor has received all the information that the creditor regularly obtains and considers in evaluating applications for the amount and type of credit requested (including, but not limited to, credit reports, any additional information requested from the applicant, and any approvals or reports by governmental agencies or other persons that are necessary to guarantee, insure, or provide security for the credit or collateral). The creditor shall exercise reasonable diligence in obtaining such information.

(g) Business credit refers to extensions of credit primarily for business or commercial (including agricultural) purposes, but excluding extensions of credit of the types described in § 202.3(a)-(d).

(h) Consumer credit means credit extended to a natural person primarily for personal, family, or household purposes.

(i) Contractually liable means expressly obligated to repay all debts arising on an account by reason of an agreement to that effect.

(j) Credit means the right granted by a creditor to an applicant to defer payment of a debt, incur debt

and defer its payment, or purchase property or services and defer payment therefor.

(k) Credit card means any card, plate, coupon book, or other single credit device that may be used from time to time to obtain money, property, or services on credit.

(l) Creditor means a person who, in the ordinary course of business, regularly participates in a credit decision, including setting the terms of the credit. The term creditor includes a creditor's assignee, transferee, or subrogee who so participates. For purposes of § 202.4(a) and (b), the term creditor also includes a person who, in the ordinary course of business, regularly refers applicants or prospective applicants to creditors, or selects or offers to select creditors to whom requests for credit may be made. A person is not a creditor regarding any violation of the Act or this regulation committed by another creditor unless the person knew or had reasonable notice of the act, policy, or practice that constituted the violation before becoming involved in the credit transaction. The term does not include a person whose only participation in a credit transaction involves honoring a credit card.

(m) Credit transaction means every aspect of an applicant's dealings with a creditor regarding an application for credit or an existing extension of credit (including, but not limited to, information requirements; investigation procedures; standards of creditworthiness; terms of credit; furnishing of credit

information; revocation, alteration, or termination of credit; and collection procedures).

(n) Discriminate against an applicant means to treat an applicant less favorably than other applicants.

(o) Elderly means age 62 or older.

(p) Empirically derived and other credit scoring systems –

(1) A credit scoring system is a system that evaluates an applicant's creditworthiness mechanically, based on key attributes of the applicant and aspects of the transaction, and that determines, alone or in conjunction with an evaluation of additional information about the applicant, whether an applicant is deemed creditworthy. To qualify as an empirically derived, demonstrably and statistically sound, credit scoring system, the system must be:

(i) Based on data that are derived from an empirical comparison of sample groups or the population of creditworthy and noncreditworthy applicants who applied for credit within a reasonable preceding period of time;

(ii) Developed for the purpose of evaluating the creditworthiness of applicants with respect to the legitimate business interests of the creditor utilizing the system (including, but not limited to, minimizing bad debt losses and operating expenses in accordance with the creditor's business judgment);

(iii) Developed and validated using accepted statistical principles and methodology; and

(iv) Periodically revalidated by the use of appropriate statistical principles and methodology and adjusted as necessary to maintain predictive ability.

(2) A creditor may use an empirically derived, demonstrably and statistically sound, credit scoring system obtained from another person or may obtain credit experience from which to develop such a system. Any such system must satisfy the criteria set forth in paragraph (p)(1)(i) through (iv) of this section; if the creditor is unable during the development process to validate the system based on its own credit experience in accordance with paragraph (p)(1) of this section, the system must be validated when sufficient credit experience becomes available. A system that fails this validity test is no longer an empirically derived, demonstrably and statistically sound, credit scoring system for that creditor.

(q) Extend credit and extension of credit mean the granting of credit in any form (including, but not limited to, credit granted in addition to any existing credit or credit limit; credit granted pursuant to an open-end credit plan; the refinancing or other renewal of credit, including the issuance of a new credit card in place of an expiring credit card or in substitution for an existing credit card; the consolidation of two or more obligations; or the continuance of existing credit without any special effort to collect at or after maturity).

(r) Good faith means honesty in fact in the conduct or transaction.

(s) Inadvertent error means a mechanical, electronic, or clerical error that a creditor demonstrates was not intentional and occurred notwithstanding the maintenance of procedures reasonably adapted to avoid such errors.

(t) Judgmental system of evaluating applicants means any system for evaluating the creditworthiness of an applicant other than an empirically derived, demonstrably and statistically sound, credit scoring system.

(u) Marital status means the state of being unmarried, married, or separated, as defined by applicable state law. The term "unmarried" includes persons who are single, divorced, or widowed.

(v) Negative factor or value, in relation to the age of elderly applicants, means utilizing a factor, value, or weight that is less favorable regarding elderly applicants than the creditor's experience warrants or is less favorable than the factor, value, or weight assigned to the class of applicants that are not classified as elderly and are most favored by a creditor on the basis of age.

(w) Open-end credit means credit extended under a plan in which a creditor may permit an applicant to make purchases or obtain loans from time to time directly from the creditor or indirectly by use of a credit card, check, or other device.

(x) Person means a natural person, corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.

(y) Pertinent element of creditworthiness, in relation to a judgmental system of evaluating applicants, means any information about applicants that a creditor obtains and considers and that has a demonstrable relationship to a determination of creditworthiness.

(z) Prohibited basis means race, color, religion, national origin, sex, marital status, or age (provided that the applicant has the capacity to enter into a binding contract); the fact that all or part of the applicant's income derives from any public assistance program; or the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act or any state law upon which an exemption has been granted by the Board.

(aa) State means any state, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

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12 C.F.R. § 202.7

Rules concerning extensions of credit.

(a) Individual accounts. A creditor shall not refuse to grant an individual account to a creditworthy applicant on the basis of sex, marital status, or any other prohibited basis.

(b) Designation of name. A creditor shall not refuse to allow an applicant to open or maintain an account in a birth-given first name and a surname that is the applicant's birth-given surname, the spouse's surname, or a combined surname.

(c) Action concerning existing open-end accounts –

(1) Limitations. In the absence of evidence of the applicant's inability or unwillingness to repay, a creditor shall not take any of the following actions regarding an applicant who is contractually liable on an existing open-end account on the basis of the applicant's reaching a certain age or retiring or on the basis of a change in the applicant's name or marital status:

(i) Require a reapplication, except as provided in paragraph (c)(2) of this section;

(ii) Change the terms of the account; or

(iii) Terminate the account.

(2) Requiring reapplication. A creditor may require a reapplication for an open-end account on the basis of a change in the marital status of an applicant who is contractually liable if the credit granted was based in whole or in part on income of the applicant's spouse and if information available to the creditor indicates that the applicant's income may not support the amount of credit currently available.

(d) Signature of spouse or other person –

(1) Rule for qualified applicant. Except as provided in this paragraph, a creditor shall not

require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested. A creditor shall not deem the submission of a joint financial statement or other evidence of jointly held assets as an application for joint credit.

(2) Unsecured credit. If an applicant requests unsecured credit and relies in part upon property that the applicant owns jointly with another person to satisfy the creditor's standards of creditworthiness, the creditor may require the signature of the other person only on the instrument(s) necessary, or reasonably believed by the creditor to be necessary, under the law of the state in which the property is located, to enable the creditor to reach the property being relied upon in the event of the death or default of the applicant.

(3) Unsecured credit – community property states. If a married applicant requests unsecured credit and resides in a community property state, or if the applicant is relying on property located in such a state, a creditor may require the signature of the spouse on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the community property available to satisfy the debt in the event of default if:

(i) Applicable state law denies the applicant power to manage or control sufficient community property to qualify for the credit requested under the creditor's standards of creditworthiness; and

(ii) The applicant does not have sufficient separate property to qualify for the credit requested without regard to community property.

(4) Secured credit. If an applicant requests secured credit, a creditor may require the signature of the applicant's spouse or other person on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the property being offered as security available to satisfy the debt in the event of default, for example, an instrument to create a valid lien, pass clear title, waive inchoate rights, or assign earnings.

(5) Additional parties. If, under a creditor's standards of creditworthiness, the personal liability of an additional party is necessary to support the credit requested, a creditor may request a cosigner, guarantor, endorser, or similar party. The applicant's spouse may serve as an additional party, but the creditor shall not require that the spouse be the additional party.

(6) Rights of additional parties. A creditor shall not impose requirements upon an additional party that the creditor is prohibited from imposing upon an applicant under this section.

(e) Insurance. A creditor shall not refuse to extend credit and shall not terminate an account because credit life, health, accident, disability, or other credit-related insurance is not available on the basis of the applicant's age.

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No. 14-520

In The
Supreme Court of the United States

VALERIE J. HAWKINS, and
JANICE A. PATTERSON,

Petitioners,

v.

COMMUNITY BANK OF RAYMORE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT COMMUNITY BANK OF RAYMORE

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COUNTERSTATEMENT OF QUESTION PRESENTED

Did the Federal Reserve Board exceed its authority when it purported to re-define who is an "applicant" for credit under 15 U.S.C. §1691a(b) of the Equal Credit Opportunity Act to include guarantors in Regulation B, 12 C.F.R. §202.2(e), thereby purporting to expand the conduct made unlawful and the persons protected by the ECOA's non-discrimination provisions, despite the unambiguous definition of that term provided by Congress?

CORPORATE DISCLOSURE

Respondent Community Bank of Raymore ("CBR") is a wholly-owned subsidiary of LoLynn Financial Corporation, a Missouri corporation. There is no publicly-held corporation that owns ten percent or more of CBR's stock.

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INTRODUCTION

Petitioners request that the Court grant a writ of certiorari to review the Eighth Circuit's decision in *Hawkins v. Community Bank of Raymore*, 761 F.3d 937 (8th Cir. 2014). In *Hawkins*, the Eighth Circuit held that a guarantor is not an "applicant" for credit under the plain meaning of the statutory definition provided by Congress in the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §1691, *et seq.*, and that the Federal Reserve Board ("FRB") exceeded its authority when, more than 10 years after the ECOA's enactment, and though the original regulatory definition—consistent with the plain meaning of the statutory definition—expressly excluded guarantors, it attempted to re-define the regulatory definition to include guarantors.

Although the Eighth Circuit reached a different result than the Sixth Circuit did two months earlier in *RL BB Acquisition, LLC v. Bridgemill Commons Development Group, LLC*, 754 F.3d 380 (6th Cir. 2014), the petition should be denied because Petitioners have failed to demonstrate that the Eighth Circuit, applying the two-step inquiry dictated by *Chevron, U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 104 S.Ct. 2778 (1984), and well-defined rules of statutory construction, erred in finding that the statutory definition is unambiguous and does not include guarantors. Nor have Petitioners shown that the disagreement between the Eighth and Sixth Circuits creates an intolerable conflict.

Recognizing the inherent weakness in the Sixth Circuit's "ambiguity" finding, Petitioners argue that the Court should examine the statute using the definition they wish Congress had used: "The question for this Court is whether...guarantors are 'applicants' for 'any aspect of a credit transaction' under the ECOA." (Pet. at 4). But that is not the statutory definition Congress provided. And neither Petitioners nor the Court are at liberty to rewrite Congress' unambiguous definition under the guise of statutory construction. Moreover, Congress re-confirmed in the 2010 amendments to the ECOA that the "applicant" is the first-party loan applicant who applies for credit directly for its own benefit, and not third parties "connected with" the applicant, such as the borrower's owners or guarantors. *See* 15 U.S.C. §1691c-2.

Further, contrary to Petitioners' assertion, the Eighth Circuit's decision does not "conflict" with the decision of any state court of last resort. Rather, in the Alaska, Iowa, Missouri and Virginia Supreme Court decisions to which Petitioners cite, the courts merely assumed—without challenge by the litigants, without performing the required *Chevron*-analysis, and without actually deciding the issue—that the FRB's regulatory re-definition is valid. Thus, those decisions do not conflict with the Eighth Circuit's decision in *Hawkins*, because the courts in those cases did not address or decide the issue.

More importantly, however, the petition should be denied because any decision this Court reaches regarding the FRB's authority to re-define who is an

"applicant" under the ECOA will have no impact on the ultimate outcome of this case. That is because Regulation B, even if it is valid, only prohibits a bank from *requiring* a spousal-guaranty, and expressly permits requiring a spousal-guaranty when the guarantor-spouse has an interest in the borrowing entity or otherwise benefits from the loan. Here, over the course of five years, Petitioners repeatedly represented to CBR that their guaranties were being provided "at the request of the Borrower" and that they had "a direct and substantial economic interest in the Borrower and expect[ed] to derive substantial benefits from [the] loans...." Because Petitioners are bound by their representations, they cannot show that CBR required their guaranties. Further, Petitioners waived any alleged ECOA-violations pursuant to the valid, retrospective waivers in their guaranties.

Thus, even though the Eighth and Sixth Circuits disagree over whether the FRB's regulatory redefinition of the term "applicant" to include guarantors is valid, resolution of that issue is irrelevant to the ultimate outcome of this case. Accordingly, this case does not present the proper vehicle for the Court to address that issue. The petition should therefore be denied.

STATEMENT OF THE CASE

In 2004, Gary Hawkins, a successful certified public accountant, and Chris Patterson, as co-trustee

of the Chris L. Patterson and Janice A. Patterson Living Trust dated June 14, 2000 (the "Trust"), decided to embark on a speculative, side venture to develop a residential subdivision in Peculiar, Missouri (the "PHC-Property"), in the hope of capitalizing on the booming real estate market. To avoid personal liability with regard to their development activities, they chose to acquire and develop the PHC-Property through PHC Development, LLC, a Missouri limited liability company ("PHC") they formed for that purpose. Gary Hawkins and the Trust[1] are two of PHC's members.

Petitioners Valerie Hawkins ("Hawkins") and Janice Patterson ("Patterson") are Gary Hawkins' and Chris Patterson's spouses. Hawkins is a Missouri-licensed speech-language pathologist. She received her undergraduate degree in 1986 and her Master's degree in 2011. Patterson received her bachelor's degree in business administration in 1977 and, together with her husband, owns and operates several companies that own and operate a number of convenience stores/gas stations in Missouri. The Pattersons' companies are owned by the Trust, and the Pattersons are the Trust's sole trustees and lifetime beneficiaries.

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[1] The Trust's capital contributions to PHC came from the Patterson's jointly-owned account, held in the name of their d/b/a, "Patterson Enterprises." All of the checks for the Trust's capital contributions were written and signed by Janice Patterson.

Between 2005 and 2008, PHC applied for and obtained four commercial loans from CBR in the total sum of $2,077,900 to acquire and develop the PHC-Property. Collectively, the loans were modified, extended and renewed twelve times. At PHC's request, each of the loans and renewals was guaranteed by Petitioners and Gary Hawkins and Chris Patterson.[2] Petitioners each signed a total of sixteen guaranties.

In signing their first three guaranties, Petitioners affirmatively represented and warranted, in writing, that they were being provided "at the request of [PHC]," and that they each had "a direct and substantial economic interest in [PHC] and expect[ed] to derive substantial benefits from any loans and financial accommodations resulting in the creation of the indebtedness guarantied...."

In signing their remaining thirteen guaranties, Petitioners represented and warranted, in writing, that "no representations or agreements of any kind" were made to them "which would limit or qualify in any way the terms of [their guaranties]"; that their guaranties were being "executed at [PHC's] request and not at the request of [CBR]"; that they read, understood and agreed to the terms of their guaranties;

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[2] The loans and several of the Pattersons' guaranties were secured by deeds of trust on the PHC-Property and/or one of the Pattersons' convenience stores, known as the "Rush Hour." The Rush Hour was owned by one of the Pattersons' limited liability companies, Patterson Raymore, LLC ("Patterson Raymore"), which is also owned by the Trust.

that the guaranties fully reflected their intentions; and that they had an opportunity to consult with their own counsel prior to signing them. Petitioners also unambiguously waived any claims or defenses against CBR, other than actual payment:

> **GUARANTOR'S WAIVERS**....
>
> Guarantor also waives any and all rights or defenses based on suretyship or impairment of collateral including, but not limited to, any rights or defenses arising by reason of...(C) any disability or other defense of Borrower, of any other guarantor, or of any other person...other than payment in full..., of the Indebtedness;...or (F) any defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness.
>
> Guarantor further waives and agrees not to assert or claim at any time any deductions to the amount guaranteed under this Guaranty for any claim of setoff, counterclaim, counter demand, recoupment or similar right....
>
> **GUARANTOR'S UNDERSTANDING WITH RESPECT TO WAIVERS**. Guarantor warrants and agrees that each of the waivers set forth above is made with Guarantor's full knowledge of its significance and consequences....

On April 16, 2012, after PHC refused to make required loan payments, CBR declared the loans in default and made demand for payment on PHC,

Petitioners and the other guarantors. CBR subsequently foreclosed on the PHC-Property and the Rush Hour.

Attempting to retract their prior, repeated representations made to induce CBR to make and renew the loans, on May 31, 2012, Petitioners sued CBR in the District Court, claiming for the first time that they had no interest in PHC and that CBR "required" their guaranties. Petitioners claimed that by doing so, without first performing a creditworthiness-analysis of their husbands,[3] CBR discriminated against them on the basis of their marital status in violation of the ECOA, 15 U.S.C. §1691(a), and Regulation B, 12 C.F.R. §202.7(d).[4] Petitioners made these assertions notwithstanding that (1) Hawkins admitted in sworn testimony that Gary Hawkins did not have the financial wherewithal to do the PHC-project on his own; (2) Chris Patterson signed numerous loan documents acknowledging that the PHC-membership interest is

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[3] Patterson also asserted that as a trustee and beneficiary of the Trust she had a direct interest in Patterson Raymore and the Rush Hour, and that CBR violated the ECOA by "requiring" her to sign the Patterson Raymore deeds of trust on its behalf.

[4] At the same time, PHC, Gary Hawkins, Chris Patterson, Patterson Raymore and the Patterson's operating company, Patterson Oil Co., Inc., sued CBR in the Circuit Court of Cass County, Missouri, seeking to escape liability on the loans, Gary Hawkins' and Chris Patterson's guaranties and the deeds of trust. *See PHC Development, et al. v. Community Bank of Raymore,* No. 12CA-CV001896 and *Patterson Oil Co., et al. v. Community Bank of Raymore,* No. 12CA-CV001932. Those actions remain pending.

held by the Trust, rather than by himself, individually; and (3) Patterson admitted in sworn testimony that she, the Trust, and the Pattersons' LLC's are one and the same: "I am me, I am the trust, I am every LLC....We're all one."

After Petitioners sued CBR, it asserted a counterclaim for breach of Petitioners' guaranties, and subsequently amended its counterclaim to include a claim for fraud, based on Petitioners' assertion that the representations they made in their guaranties were false. Petitioners asserted CBR's alleged ECOA-violation as an affirmative defense.

On summary judgment, the District Court held that Petitioners, as guarantors, were not "applicants," and that CBR did not violate the ECOA by obtaining their guaranties. (Petitioners' Appendix ("Pet.App.") 20-23).[5] The District Court entered judgment against Petitioners on their ECOA-claim and struck their ECOA-defense (the "ECOA Ruling"). *Id.* In an earlier ruling, the District Court struck Petitioners' jury demand (the "Jury Waiver Ruling"), finding that Petitioners were educated and sophisticated and that they "knowingly and voluntarily" agreed to waive their right to a jury trial when they signed their guaranties. In doing so, the District Court found that Petitioners repeatedly represented that they read,

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[5] The District Court also held that Patterson could not state an ECOA-claim based on the Patterson Raymore deeds of trust. (Pet.App. 23). Petitioners did not appeal that ruling.

understood and agreed to the terms of their guaranties, that their guaranties fully reflected their intentions, and that they had the opportunity to discuss the same with their attorneys, and held that it would not "allow the Plaintiffs to evade the agreed-upon waiver simply because they no longer wish to be bound by it." (Respondent's Appendix ("Resp.App.") 8-9).

After declining to exercise supplemental jurisdiction over CBR's counterclaims,[6] the District Court entered its Amended Judgment on September 10, 2013. Petitioners appealed the ECOA and Jury Waiver Rulings. However, on appeal, Petitioner's did not challenge the District Court's conclusion that they "knowingly and voluntarily" waived their right to a jury trial or any of the factual findings supporting that conclusion.

On August 5, 2014, the Eighth Circuit affirmed the ECOA Ruling and declined to review the Jury Waiver Ruling, finding it was moot. (Pet.App. 10-11). *Hawkins,* 761 F.3d 937. In affirming the ECOA Ruling, the Eighth Circuit, applying the two-step inquiry required by *Chevron,* correctly determined that (1) the statutory definition of the term "applicant" in 15 U.S.C. §1691a(b) is unambiguous and does not include a guarantor, and (2) the FRB exceeded its

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[6] CBR subsequently re-filed its counterclaims in state court. *See Community Bank of Raymore v. Valerie Hawkins, et al.,* Case No. 13CA-CV002998. That action is still pending.

authority when it purported to re-define that term to include guarantors in 12 C.F.R. §202.2(e).

REASONS FOR DENYING THE PETITION

I. Review is not warranted because it will have no effect on the outcome of this case where Petitioners repeatedly represented that they have an interest in PHC, and actually do, and that their guaranties were provided at PHC's request, and Petitioners waived any alleged ECOA-violations.

The ECOA was enacted in 1974[7] "to eradicate discrimination waged against women, especially married women whom creditors traditionally refused to consider for individual credit." *Anderson v. United Fin. Co.*, 666 F.2d 1274, 1277 (9th Cir. 1982); *see also Mayes v. Chrysler Credit Corp.*, 37 F.3d 9, 11 (1st Cir. 1994). Prior to its enactment, creditors traditionally refused to extend individual credit to married women and required that husbands co-sign their wives' loan applications as a condition of approving such loans. *Anderson*, 666 F.2d at 1277. Thus, as Judge Posner recognized in *Moran Foods, Inc. v. Mid-Atlantic Market Development Co., LLC*, 476 F.3d 436 (7th Cir.

[7] The ECOA was amended in 1976 to prohibit discrimination against an applicant on the basis of race, color, religion, national origin and age, in addition to sex and marital status. Equal Credit Opportunity Act, Pub.L. No. 94-239, §2, 90 Stat. 251 (1976).

2007), "[s]o far as the prohibition against discrimination on the basis of marriage is concerned...it is apparent that what the [ECOA] was intended to do was to forbid a creditor to deny credit to a woman on the basis of a belief that she would be not be a good credit risk because she would be distracted by child care or some other stereotypically female responsibility." *Id.* at 441 (citations omitted).

The ECOA provides that "[i]t shall be unlawful for any creditor to discriminate *against any applicant*, with respect to any aspect of a credit transaction...on the basis of...marital status...." 15 U.S.C. §1691(a)(emphasis added). For purposes of the proscribed conduct, Congress unambiguously defined an "applicant" as:

> [A]ny person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit.

15 U.S.C. §1691a(b).

Consistent with Congress' express intent "that the essential prohibition in [the] legislation is directed at discrimination *against applicants*," S.Rep. No. 589, 94th Cong., 2nd Sess. 3 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 403, 407

("S.Rep. No. 94-589")(emphasis added),[8] the original regulations adopted by the FRB, acknowledging the unambiguous, statutory definition, expressly *excluded* guarantors from the regulatory definition:

> Applicant means any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may be contractually liable regarding an extension of credit *other than a guarantor, surety, endorser, or similar party*.

12 C.F.R. §202.2(e) (1977)(emphasis added).

However, effective December 16, 1985, in direct conflict with Congress' clear intent, the FRB purported to substantively change the ECOA's scope by re-defining the term "applicant" to include guarantors. 12 C.F.R. §202.2(e) (1985).[9] Despite the FRB's attempt

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[8] Not surprisingly, the word "guarantor" does not appear anywhere in the ECOA's legislative history. *Id.*

[9] In re-defining who is an "applicant" for credit, the FRB claimed that "the principal effect of the amendment [was] to give guarantors...standing to seek legal remedies when a violation occurs under §202.7(d)." Revision of Regulation B, 50 Fed.Reg. 48,018, 48,020 (1985). However, the Official Staff Interpretations confirmed that the effect of the amendment was much broader than simply granting "standing" to a guarantor where requiring a guaranty constituted discrimination against the "applicant" for credit and that, under the FRB's re-definition, the ECOA and Regulation B would now "bar a creditor from requiring the signature of a *guarantor's* spouse just as they bar the creditor from requiring the signature of an *applicant's* spouse." 50 Fed.Reg. 48.018, 48,052 (emphasis added). Thus, the FRB's re-definition purports to substantively change both the

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to re-define the term "applicant" to include guarantors, Congress has *never* amended the statutory definition to include anyone other than those persons that come within the term's plain meaning, *i.e.*, a borrower. And it has *never* expanded the conduct prohibited by the ECOA to encompass anything other than discrimination *against an "applicant."*

Petitioners suggest that the disagreement between the Eighth Circuit in *Hawkins,* 761 F.3d 937 and the Sixth Circuit in *RL BB Acquisition,* 754 F.3d 380, regarding the validity of the FRB's re-definition of the term "applicant" to include guarantors, warrants review of that issue in this case. But resolution of that issue is irrelevant to the ultimate outcome of this case, which, irrespective of the FRB's re-definition, can be sustained on a number of alternative grounds. *See Noriega v. Pastrana*, 130 S.Ct. 1002, 1009 (2010)(noting that review of a statute's validity is not warranted where decision can be sustained on alternate grounds); STEPHEN M. SHAPIRO, *et al.*, SUPREME COURT PRACTICE, Ch. 4.4(f) at 249 (10th ed. 2013)(noting that where resolution of an issue "is irrelevant to the ultimate outcome of the case before the Court," review is not warranted).

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conduct prohibited and the persons afforded protection. *See Mayes,* 37 F.3d at 11 ("the regulation's change in 'standing' was actually a surrogate for an enlarged view of what is unlawful....").

A. Petitioners are bound by their admission that their guaranties were provided at PHC's request. Thus, Petitioners cannot show that they were required to provide their guaranties in purported violation of the ECOA.

The fundamental prohibition in the regulations implemented by the FRB is that a creditor shall not *require* the signature of the applicant's spouse on a credit instrument except in limited circumstances. 12 C.F.R. §202.7(d). But nothing in the ECOA or the regulations prohibits a creditor from obtaining a spousal-guaranty when it is offered or provided at the borrower's request. *Id.*; *see also U.S. v. Meadors*, 753 F.2d 590, 593 (7th Cir. 1985)(holding that the ECOA was not implicated where wife was not required to sign guaranty, but voluntarily did so).

Here, over the course of *five years*, in order to induce CBR to loan PHC over $2 million for a speculative real estate venture, Petitioners represented on *sixteen* separate occasions that their guaranties were being provided *"at the request of [PHC]."* On each occasion, Petitioners also acknowledged that they read, understood and agreed to the terms of their guaranties, that their guaranties fully reflected their intentions, and that they had the opportunity to consult with counsel prior to signing them. And while Petitioners had no qualms in making these representations to induce CBR to make the loans, now that they no longer find them convenient, Petitioners seek

to cavalierly toss their solemn, written representations aside.

The District Court, finding that Petitioners were sophisticated and educated and that they "knowingly and voluntarily" waived their right to a jury trial when they signed their multiple guaranties, refused to allow Petitioners to evade their repeated, written representations when they similarly sought to recant that agreement "simply because they no longer wish[ed] to be bound by it." (Resp.App. 5-9). Petitioners did not appeal that ruling and are bound by the District Court's findings and conclusions. *Coney v. Union Pacific R.R.*, 136 F.3d 1195, 1197 (8th Cir. 1998). And just like Petitioners are bound by their knowing and voluntary waiver of their right to a jury trial, they are equally bound by their repeated representations that their guaranties were provided *at PHC's request*. *Warren v. Paragon Technologies Group, Inc.*, 950 S.W.2d 844, 846 (Mo. 1997)("Parties are presumed to read what they sign.").

Because CBR did not require Petitioners' guaranties, whether the FRB's re-definition of "applicant" to include guarantors is valid or not is irrelevant to the outcome of this case, as neither the ECOA nor Regulation B prohibit a spouse from voluntarily providing a guaranty, as Petitioners did here. Thus, the petition should be denied.

B. Petitioners cannot contradict their representation that they have "a direct and substantial economic interest in [PHC] and expect[ed] to derive substantial benefits from any loans" they guaranteed. Thus, CBR could properly require their guaranties.

Petitioners claim that they have no interest in PHC or the loans. But that is not what they represented to CBR when they signed their first three guaranties. Rather, to induce CBR to loan PHC over $2 million, Petitioners confirmed, in writing, that:

> **13. RELIANCE.** I acknowledge that you are relying on this Guaranty in extending credit to the Borrower, and I have signed this Guaranty to induce you to extend such credit. I represent and warrant to you that I have a direct and substantial economic interest in [PHC] and expect to derive substantial benefits from any loans and financial accommodations...guarantied hereby.

The Official Staff Interpretations of Regulation B permit a lender to require the owners of the borrower to guarantee a loan. Official Staff Interpretations, 12 C.F.R. Pt. 202, Supp. I, §202.7(d)(6). And the cases hold that "a lender can require the signature of a borrower's spouse who co-owns the entity benefiting from the loan." *Ballard v. Bank of America,* 734 F.3d 308, 310-11 (4th Cir. 2013); *see, e.g., Midlantic Nat'l Bank v. Hansen,* 48 F.3d 693, 700 (3d Cir. 1995)(where loans financed company co-owned by

spouses, "at the very least," wife was a *de facto* joint applicant who could be required to guarantee loans); *Riggs Nat'l Bank v. Webster,* 832 F.Supp. 147, 151 (D.Md. 1993)(where loan was obtained to renovate property owned by borrower's wife, she was a "*de facto* joint applicant" who could be required to sign loan); *Baybank v. Bornhofft*, 694 N.E.2d 854, 859 (Mass. 1998)(where co-maker owned a 25% interest in trust that received loan proceeds and trust's assets were collateral for the loan, co-maker/ beneficiary was a joint applicant and could be required to sign loan).

Despite their belated protestations that they have no interest in PHC or the loans, Petitioners' assertions contradict the express representations they made to induce CBR to make the loans.[10] If those representations were untrue, Petitioners could easily have struck those statements from their guaranties and given CBR a fair chance to protect itself against after-the-fact charges of wrongdoing. Permitting Petitioners to disavow those representations now, only after the loans have been fully funded and are in default, would violate Missouri's parol evidence rule, destroying the sanctity of written contracts. *Johnson*

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[10] In Missouri, spouses have a marital interest in the other spouse's property which is subject to a forced, elective-share at death. Mo. Rev. Stat. Ann. §§ 474.160, 474.170. This marital interest is more than a "mere expectancy," and permits a wife to maintain an action during her husband's lifetime to recover property transferred in fraud of her martial interest. *Id.* at §474.150.

ex rel. Johnson v. JF Enterprises, LLC, 400 S.W.3d 763, 769 (Mo. 2013)(the parol evidence rule is a substantive rule that precludes the use of extrinsic evidence to contradict an integrated agreement, and is intended to preserve the sanctity of contracts). Missouri law prohibits Petitioners from using their own fraud to escape the bar of the parol evidence rule. *Henderson v. Henderson's Ex'r,* 13 Mo. 151, 1850 WL 4163, 2 (1850)(a party cannot use its own fraud to vary or contradict a contract). Thus, because Petitioners cannot contradict their written representations, and because obtaining their guaranties was permissible in light of Petitioners' representations, any decision by this Court regarding the FRB's authority to re-define "applicant" to include guarantors will not change the outcome of this case.[11]

Moreover, while Petitioners claim that Chris Patterson, as a co-trustee, and not the Trust, is the PHC-member, Patterson admitted that she and the

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[11] As the Eighth Circuit noted, under Missouri law, "co-ownership of property [and accounts] by a husband and wife creates a presumption of tenancy by the entireties," such that "execution against one spouse alone cannot affect property held...as tenants by the entirety." *Hawkins,* 761 F.3d at 942, n. 6 (internal citations omitted). Considering that Missouri spouses can move their property in and out of tenancy by the entirety status at whim, depriving a creditor of access to assets and accounts it took into consideration in deciding to extend credit prior to default and before the lending relationship failed, requiring Petitioners' guaranties would have been a "sound commercial practice unrelated to any stereotypical view of a wife's role." *Id.* (quoting *Moran Foods,* 476 F.3d at 442).

Trust are one and the same: "I am me, I am the trust, I am every LLC....We're all one." Further, all capital contributions made to PHC came from jointly-owned funds in the Pattersons' joint account, held in the name of their d/b/a, "Patterson Enterprises," giving Patterson a direct interest in PHC. And Patterson, as a co-trustee and lifetime beneficiary of the Trust, holds a legal and beneficial interest in the PHC-membership interest. *Horn v. Muckerman*, 307 S.W.2d 482, 485 (Mo. 1957); *Thompson v. Koenen,* 396 S.W.3d 429, 435 (Mo. Ct. App. 2013). Because Patterson has an interest in the PHC-membership interest and hence, PHC, even under the FRB's re-definition, Patterson's guaranties could have properly been required. *See Baybank*, *supra.* Thus, the validity of 12 C.F.R. §202.2(e) is irrelevant to the ultimate outcome of this case, and the petition should therefore be denied.

C. Petitioners waived any ECOA-claims in the valid, retrospective waivers in their guaranties.

Rights under the ECOA, like other federal statutory rights, can be waived. *Ballard*, 734 F.3d at 313-314; *CB 2010 LLC v. Ithaca Coatings,* No. 12-13930, 2013 WL 2250168, 9 (E.D.Mich. May 22, 2013); *see also Truckenbrodt v. First Alliance Mortgage Co.*, No. 96-C-822, 1996 WL422150, 2 (N.D.Ill. July 24, 1996) ("There is no indication that Congress intended to preclude a waiver of judicial remedies under the ECOA.").

In *CB 2010,* the court held that although such rights can only be waived retrospectively, where the conduct complained of was the bank's obtaining guaranties without first making a creditworthiness determination, as Petitioners claim here, the alleged ECOA-violation *had already occurred at the time the defendants signed their guaranties.* 2013 WL 2250168, 9. Thus, the waiver of claims and defenses in the defendants' guaranties operated retrospectively and barred their ECOA-claim. *Id.*; *Ballard,* 734 F.3d at 313-314 (declining to enforce waiver in original guaranties, but holding that waivers in subsequent loan-restructuring was valid).

Like the retrospective waivers in the *CB 2010* guaranties, which are identical to the waivers in the last *thirteen* guaranties Petitioners signed, Petitioners waived "any defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness," and waived and agreed not to assert "any claim of setoff, counterclaim, counter demand, recoupment or similar right." 2013 WL 2250168, 9. Petitioners similarly warranted that "each of the waivers...[was] made with Guarantor's full knowledge of its significance and consequences," that they fully read, understood and agreed to the guaranties' terms, that the guaranties fully reflected their intentions, and that they had an opportunity to consult with counsel prior to signing them. *Id.*

Because any alleged ECOA-violations occurred *before* Petitioners signed their guaranties, the waivers in those guaranties are valid, retrospective waivers

and bar Petitioners' ECOA-claims and defenses. *CB 2010, supra* at 3, 9; *accord, Warnebold v. Union Pacific R.R.*, 963 F.2d 222, 223 (8th Cir. 1992). Thus, whether the FRB's re-definition is valid is irrelevant to the outcome of this case. The petition should therefore be denied.

II. The Eighth Circuit's recent disagreement with the Sixth Circuit on the issue of whether the statutory definition of the term "applicant" in the ECOA is unambiguous does not warrant review. The Eighth Circuit correctly interpreted the statutory definition according to its plain meaning, whereas the Sixth Circuit ignored basic rules of statutory construction and its prior holdings in order to manufacture an ambiguity. Further, in its most recent amendment of the ECOA in 2010, Congress made clear that the "applicant" is the borrower, not third parties who participate in the larger loan transaction, such as guarantors.

This case raises the unremarkable question of a federal agency's authority to adopt regulations that directly contradict Congress' clear intent, as unambiguously expressed in a statute. Although the Court has not previously addressed Regulation B's

validity,[12] there is nothing exceptional about applying the now-canonical, two-step analysis dictated by the Court in *Chevron* to determine whether the FRB's re-definition of the term "applicant" to include guarantors is valid.

Under *Chevron*'s framework, a court must first determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842, 104 S.Ct. at 2781. Thus, "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843, n. 9, 104 S.Ct. 2782, n. 9. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 131 S.Ct. 1885, 1891 (2011)(citation omitted). Thus, "[w]hen the words of a statute are unambiguous...[the] first canon [of statutory construction] is also the last," and the "judicial inquiry is complete." *Connecticut Nat. Bank v.*

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[12] The ECOA was amended in 2010 to transfer rule-making authority to the Consumer Financial Protection Bureau ("CFPB"). *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub.L. No. 111-203, §§ 1085(1), (3), 124 Stat. 2083 (2010) ("Dodd-Frank Act").

Germain, 503 U.S. 249, 253-254, 112 S.Ct. 1146, 1149 (1992). It is only where "the statute is silent or ambiguous with respect to the specific issue" presented that a court proceeds to *Chevron*'s second step, requiring that the court determine whether "the agency's reading fills a gap or determines a term in a reasonable way in light of the Legislature's design." *Regions Hosp. v. Shalala*, 522 U.S. 448, 450, 118 S.Ct. 909, 911 (1998)(citing *Chevron*, 467 U.S. at 843, n. 11, 104 S.Ct. at 2782, n. 11).

A. Recognizing its paramount obligation to interpret the ECOA according to its plain meaning, the Eighth Circuit refused to manufacture an ambiguity to validate an invalid regulation.

In *Hawkins*, the Eighth Circuit, applying well-defined rules of statutory construction, held that the statutory definition of the term "applicant" is not ambiguous and that under that definition, a guarantor is not an "applicant" and thus, is not entitled to protection from marital-status discrimination under the ECOA. *Hawkins*, 761 F.3d at 941-943.

In reaching this conclusion, the Eighth Circuit noted that Congress explicitly provided that "[t]o qualify as an applicant under the ECOA, a person must 'appl[y] to a creditor directly for...credit....'" *Id.* at 941 (quoting §1691a(b)). Looking to the definition of the term "apply," which means "to make an appeal or request esp[ecially] formally and often in writing

and usu[ally] for something of benefit to oneself," *id.* (quoting Webster's Third New International Dictionary 105 (2002)), the court concluded that "the plain language of the ECOA unmistakably provides that a person is an applicant only if she requests credit." *Id.* Recognizing that "a guaranty is an undertaking...to answer for payment of some debt, or performance of some contract, of another person in the event of default," which is "collateral and secondary to the underlying loan transaction between the lender and borrower,"[13] the court reasoned that by signing a guaranty, a person does not request credit. 761 F.2d

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[13] Seizing upon the Eighth Circuit's use of the term "secondary," Petitioners argue that the court ignored that their guaranties render them "primarily and unconditionally" liable. Petitioners, however, admitted in the Eighth Circuit that their liability was contingent on PHC's default. Moreover, their argument ignores the very nature of a guaranty, which only subjects them to liability in the event of default. *Central Bank of Kansas City v. Perry*, 427 S.W.3d 285, 288 (Mo. Ct. App. 2014)("A guaranty is a contract in which a guarantor agrees to become secondarily liable for the obligation of a debtor in the event the debtor does not perform the primary obligation....The heart of a contract for guaranty is that the signor has agreed to be liable principally for another's debt," upon default.). That contingent liability distinguishes a guarantor from a co-maker, who is responsible for making payments both before and after default. Further, Petitioners failed to raise this argument in the District Court, and only raised it for the first time in their reply in the Eighth Circuit, thereby waiving it. *Cole v. Intern. Union, United Auto., Aerospace & Agr. Implement Workers of America*, 533 F.3d 932, 936 (8th Cir. 2008)(arguments not raised in the district court in opposing summary judgment are waived on appeal); *U.S. v. Wilkens*, 742 F.3d 354, 360 (8th Cir. 2014)(arguments not raised in an opening brief on appeal are waived).

at 941-942 (internal citation omitted). And because a guarantor does not request credit, the court concluded that a guarantor does not "qualify as an applicant under the unambiguous text of the ECOA." *Id.* at 941. In reaching this conclusion, the court agreed with Judge Posner, who similarly found that "there is nothing ambiguous about [the term] 'applicant' and no way to confuse an applicant with a guarantor." *Id.* at 942 (quoting *Moran Foods,* 476 F.3d at 441). The court therefore held that it would not defer to the FRB's re-definition, and that "a guarantor is not protected from marital-status discrimination by the ECOA." *Id.* at 942. Thus, because Petitioners only argued that they qualified as "applicants" based on their status as guarantors and did not assert that they participated in the loan application process,[14] the court held that Petitioners are not "applicants," and that CBR did not violate the ECOA by "requiring" their guaranties. *Id.* at 943.

Judge Colloton, in his concurring opinion, noted that under the "usual meaning" of the term "to apply,"

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[14] Petitioners suggest that even if they were not applicants in connection with the original loans, they were on each renewal because they "certainly wanted 'an extension, renewal or continuation of credit.'" Petitioners waived this argument by failing to raise it in the District Court. *Cole*, 533 F.3d at 936. Further, Petitioners' argument, bereft of any facts, fails to explain how a guarantor's mere hope that the maturity date of a loan will be postponed constitutes a request or application "for an extension, renewal or continuation of credit." 15 U.S.C. §1691a(b).

as understood at the time the ECOA was enacted, "an 'applicant' who 'applies for credit' is the one who requests credit to benefit herself, not credit to benefit a third party." *Id.* at 943 (citing Webster's Third New International Dictionary 105 (1971)). Examining the text of the ECOA, as a whole, Judge Colloton found that "[t]he context of the ECOA confirms that Congress employed the ordinary meaning of the term 'apply' in the phrase 'applies for credit,'" and that the statute "contemplates a first-party applicant who requests credit to benefit herself." *Id.* For example, Judge Colloton noted that "the use of the definite article" in §1691(d)(1), which requires that within 30 days "after receipt of a completed application for credit, a creditor shall notify *the applicant* of its action on the application," *id.* (emphasis in original), "shows that the applicant is the single person to whom credit would be extended, not a third party asking on behalf of the putative debtor." 761 F.3d at 943.

Further confirming that the "applicant" is the borrower to whom credit is extended, Judge Colloton looked to the 1991 amendment adding §1691(e)(1), which "refers to a creditor taking action in connection with 'the applicant's application for a loan,'" and pointed out that "it would be unnatural to conclude that a third party who offers a promise in support of an application thereby submits what the statute describes as an 'application for a loan'...and a 'completed application for credit[.]'" 761 F.2d at 943-944 (citing §§ 1691(d)(1) and (e)(1)). Likewise, Judge

Colloton noted that in §1691(d)(4), the statute "specifically envisions the involvement of a third party who requests an extension of credit to a first-party applicant, but distinguishes between the third-party requestor and the 'applicant.'" *Id.* at 944. Judge Colloton concluded that this distinction between the applicant and a third party in the statutory text, again, confirms that "the 'applicant' is the party to whom credit will be extended." *Id.*

Because "an agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms," and can only exercise its discretion in the "interstices created by statutory silence or ambiguity," *Utility Air Regulatory Group v. E.P.A.*, 134 S.Ct. 2427, 2445 (2014), as Judge Colloton aptly acknowledged, "[w]hen the ordinary meaning [of a term] aligns with a natural reading of [that] term in the context of the statute, there is no ambiguity that gives an agency license to adopt an alternative meaning. *Id.* (citing *Carcieri v. Salazar*, 555 U.S. 379, 388, 129 S.Ct. 1058, 1064 (2009)). If Congress had wanted to include guarantors within the protection of the statute, it could have easily done so. By only providing protection to the "applicant," it did not. Under *Chevron,* that should be the end of the inquiry. Any dissatisfaction with that result lies with Congress, not this Court.

B. The Sixth Circuit manufactured an "ambiguity" in order to impose its own view of what would best effectuate the ECOA's goal of preventing marital-status discrimination.

In contrast to the plain meaning adopted by the Eighth Circuit, two months earlier, in *RL BB Acquisition*, 754 F.3d 380, the Sixth Circuit, in order to achieve what it perceived are the ECOA's broad remedial goals, focused its analysis on two words in the statutory definition ("applies" and "credit"), in isolation, to conclude that the statutory definition is "ambiguous" and "could" be construed to "encompass all those who offer promises in support of an application—including guarantors," who the court rationalized "make a formal request for aid in the form of credit for a third party." *Id.* at 384-385. The Sixth Circuit reached this result under the guise of statutory construction, notwithstanding its acknowledgment that the statute does not "overtly include guarantors," and although it recognized that "[a] guarantor does not traditionally approach a creditor herself asking for credit," but instead, "is a third party to the larger application process." *Id.*[15] Rather than assuming that the ordinary meaning of the term "applies" "accurately expresses the legislative purpose," *see Schindler*

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[15] As the Eighth Circuit concluded, recognition that a guarantor does not apply for credit in the "traditional" and usual sense of the word should have ended the Sixth Circuit's inquiry because it "demonstrates that a guarantor unambiguously does not request credit." *Hawkins*, 761 F.3d at 941.

Elevator Corp., 131 S.Ct. at 1891, the Sixth Circuit, stretching to find an ambiguity, rationalized that because a guarantor offers her guaranty "in consideration for the credit she hopes the borrower will receive," a guarantor "does formally approach a creditor in the sense that [she] offers up her own personal liability to the creditor if the borrower defaults." *Id.* But a guarantor does not "apply" for a loan by the mere "hope" that credit will be extended to the borrower, and the act of providing a guaranty has never been thought of as applying for anything directly, within the traditional, plain meaning of that term.

Significantly, the Sixth Circuit's conclusion ignored the context in which the term "applies" is used (including that, by the statute's express terms, it is limited to the person who "applies for credit *directly*"), 15 U.S.C. §1691a(b)(emphasis added), and that Congress explicitly distinguished between the applicant and a third party who requests credit on the applicant's behalf. 15 U.S.C. §1691(d)(4). The court also ignored that when Congress has intended to include someone other than the person applying for something for its own benefit within the term "applicant," it has expressly said so. *See, e.g.*, 18 U.S.C. §923(d)(1)(B)(providing that the "applicant" under the Gun Control Act includes, "in the case of a corporation, partnership, or association, any individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of the corporation, partnership, or association...."). Congress' refusal to broadly define the "applicant" in

the ECOA makes clear that it intended that the term be interpreted according to its plain meaning and only encompass those persons requesting credit for their own benefit.

Compounding its error, the court found that the definition of the term "credit" in §1691a(d), which uses the word "debtor" rather than "applicant," furthered the purported ambiguity by somehow suggesting that the "applicant" and the "debtor" "are not always the same person." 754 F.3d at 385. From that, the court jumped to the illogical conclusion that "[i]f an applicant is not necessarily the debtor, it would be reasonable to conclude that the applicant could be a third party, such as a guarantor." *Id.* Its conclusion, however, ignored its prior decision in *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207 (6th Cir. 1997), where it acknowledged that the debtor and the applicant are one and the same; the only distinction being that prior to an extension of credit, that person is an "applicant," whereas after the extension of credit, he becomes a "debtor." *Id.* at 1209. It also ignored that Congress explicitly distinguished between the applicant and a third party requestor, and chose to only prohibit discrimination against and confer rights on the former. *See* 15 U.S.C. §1691(d)(4).

The Sixth Circuit found comfort in its conclusion based on its erroneous belief that it "accords with the vast majority of courts that have examined the issue," 754 F.3d at 386 (citing *Empire Bank v. Dumond*, No. 13-CV-388, 2013 WL 6238605, 6 (N.D.Okla. Dec. 3, 2013)), and that Congress has remained silent and

done nothing to "clarif[y] that the term 'applicant' cannot include guarantors." *Id.*[16]

But the so-called "vast majority" to which the Sixth Circuit referred *never* decided whether the statutory definition is ambiguous, or whether the regulatory definition is valid.[17] Rather, other than the Sixth Circuit, itself, the *only* courts that have actually decided the issue *after* conducting the required *Chevron*-analysis, have uniformly held that the statutory definition is *unambiguous* and does *not* include

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[16] Petitioners acknowledge the tenuous nature of the Sixth Circuit's "ambiguity" finding by arguing not that the statutory definition is ambiguous, but that it contains a "gap" because it does not expressly exclude guarantors. According to Petitioners, in order to prevent the FRB from usurping its legislative role, not only was Congress required to plainly state who the applicant is, as it did, but it was apparently required to also state everyone it isn't. No rule of statutory construction requires such useless redundancy.

[17] The *Dumond* court, without discussion, found that "[w]hether the term 'applicant' includes guarantors is not unambiguous," and held, *ipso facto*, that the FRB's re-definition in §202.2(e) is valid. 2013 WL 6238605, 6. It did so, however, *without* examining the statutory language, *without* conducting a *Chevron*-analysis, and *without* even attempting to explain what it thought was "not unambiguous" with the statutory definition. Like the Sixth Circuit, the court's conclusion appears to have been based on its own self-justification that "[a]ccepting that the term includes guarantors would best effectuate the ECOA's goal of preventing discrimination on the basis of marital status," and a reluctance to invalidate the FRB's regulatory scheme unless it was directed to do so by the Tenth Circuit. *Id.* (citing *Citgo Petroleum Corp. v. Bulk Petroleum Corp.*, No. 08-CV654-TCK-PJC, 2010 WL 3931496 (N.D.Okla. Oct. 5, 2010)).

guarantors. *Hawkins*, 761 F.3d 937; *Moran Foods*, 476 F.3d 436; *Smithville 169 v. Citizen's Bank & Trust*, No. 4:11-CV-0872-DFK, 2013 WL 434044 (W.D.Mo. Feb. 5, 2013); *Arvest Bank v. Uppalapati*, No. 11-03175-S-DGK, 2013 WL 85336 (W.D.Mo. Jan. 7, 2013); *Champion Bank v. Regional Development, LLC*, No. 4:08CV1807-CDP, 2009 WL 1351122 (E.D.Mo. May 13, 2009).[18]

C. Congressional silence is not a license for courts to ignore a statute's plain meaning. But here, Congress has not remained silent. In the 2010 amendments to the ECOA, Congress reconfirmed that the "applicant" is the person who applies for a loan to benefit itself.

Moreover, while the Sixth Circuit justified its ambiguity finding in perceived congressional silence, this Court has been clear that legislative silence is no aid to interpretation where, as in this case, there is

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[18] The other circuits that have touched on the issue of whether guarantors are protected under the ECOA did so *without* performing the required *Chevron*-analysis, and merely *assumed*, without challenge, that the FRB's re-definition is valid. *See, e.g., Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28 (3d Cir. 1995); *Mayes*, 37 F.3d 9. Significantly, these courts were never asked to decide whether the FRB's re-definition is valid, nor did they purport to decide that issue. The fact that these and other courts, as well as the litigants, simply assumed that the regulatory re-definition is valid is not an excuse to flout the usual rules of statutory construction.

no evidence that the FRB's re-definition was ever brought to Congress' attention. It is only where "an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects," that the Court will presume that "the legislative intent has been correctly discerned." *U.S. v. Rutherford*, 442 U.S. 544, 554, n. 10, 99 S.Ct. 2470, 2476, n. 10 (1979)(quoting *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489, 60 S.Ct. 982, 989 (1940)); *see also* 2B NORMAN J. SINGER, *et al.*, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION, §49:9 at 134-135 (7th ed. 2008)(the congressional-acquiescence argument is inapplicable "where nothing indicates that the legislature had its attention directed to the administrative interpretation upon reenactment").

Moreover, although no evidence exists to suggest that the FRB's re-definition has ever been brought to Congress' attention, significantly, when Congress amended the ECOA as part of the Dodd-Frank Act, it enacted §1691c-2, relating to the collection of data for small business loans. Pub.L. No. 111-203, §1071(a), 124 Stat. 2056 (2010). That statute, which must be read *in pari materia* with the ECOA's other provisions, *see Erlenbaugh v. U.S.*, 409 U.S. 239, 244, 93 S.Ct. 477, 480 (1972), makes clear that the "applicant" is the first-party loan applicant who applies for credit directly for its own benefit, and does not include the applicant's owners or others who are "connected with" it.

For example, in §1691c-2(e)(2), which requires that financial institutions compile and maintain certain information provided by any "loan applicant," including..."the amount of credit...*applied for*, and the amount of credit...approved *for such applicant*," Congress re-confirmed that the "credit" applied for is the credit extended to the first-party applicant, and does not include a third party, such as a guarantor, who merely agrees, as part of the larger loan transaction, to be liable for repayment in the event of a default, but does not apply for or receive any credit. 15 U.S.C. §1691c-2(e)(2)(C). Likewise, in §1691c-2(e)(3), which prohibits the inclusion of certain personally identifiable information "concerning any individual who is, or is connected with, the women-owned, minority-owned, or small business loan applicant" in such a compilation, Congress clearly distinguished between the applicant and third parties who are "connected with" the applicant, whether through ownership or otherwise. *Id.*

Given this clear statement of who the applicant is, and Congress' distinction between the applicant and those "connected with" the applicant, there is no room to suggest that Congress acquiesced in the FRB's re-definition, thereby expanding the scope of the ECOA's protection and what it makes unlawful. On the contrary, in the Dodd-Frank Act, Congress re-confirmed that the "applicant" is the first-party applicant who "applies for credit directly" for its own benefit. Had Congress been aware of the FRB's re-definition (though no evidence suggests that is the

case), and intended to encompass third parties, such as guarantors, within the ECOA's scope, it would have had no need to distinguish between the applicant, its owners and others "connected with" the applicant, as it did in §1691c-2. In so doing, Congress implicitly re-confirmed the plain meaning of the statutory definition, and rejected any attempt to expand the ECOA's protection to third parties, such as guarantors.[19]

In *Hawkins*, the Eighth Circuit, applying the time-tested framework of *Chevron* and well-known rules of statutory construction, correctly concluded that guarantors are not "applicants" under the ECOA. Now that the issue has actually been brought to the forefront through the Sixth and Eighth Circuits' decisions, this Court should deny the petition so that the circuit and lower courts can have an opportunity to fully examine and weigh in on the issue. Petitioners have failed to demonstrate that the narrow conflict between the Sixth and Eighth Circuits would be intolerable were it allowed to continue. And this Court will undoubtedly benefit from a more thorough and thoughtful consideration of the issue by other courts before it steps into the fray.

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[19] Petitioners' hypothetical of a minority-owned, limited liability company loan applicant that is denied credit based on the racial make-up of its owners is irrelevant in construing the plain meaning of the statute. Under that plain meaning, if the LLC could demonstrate discrimination, the LLC-applicant, not its owners, who chose to conduct business in a corporate form, would be the "aggrieved applicant" under §1691e.

III. The Eighth Circuit's decision does not "conflict" with any decisions by a state court of last resort. The Alaska, Iowa, Missouri and Virginia Supreme Courts have never actually decided the issue. Rather, those courts merely *assumed*, without challenge and without conducting the required *Chevron*-analysis, that the regulatory re-definition is valid.

Petitioners suggest that the Eighth Circuit's decision directly conflicts with decisions by the Supreme Courts of Alaska, Iowa, Missouri and Virginia, and that certiorari is warranted to resolve this "split." But Petitioners fail to disclose that none of the litigants in those cases challenged the validity of the FRB's re-definition, and that the courts, *without* conducting the required *Chevron*-analysis, merely *assumed*, without actually deciding, that the regulatory re-definition is valid and that a guarantor is protected. *See Still v. Cunningham*, 94 P.3d 1104 (Alaska 2004);[20] *Bank of the West v. Kline*, 782 N.W.2d 453 (Iowa 2010);[21] *Boone Nat. Sav. & Loan Ass'n v.*

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[20] Significantly, the *Cunningham* court, acknowledging the plain meaning of the statute, noted that the corporate-borrower was the loan applicant under the statute; but citing to §202.2(e), found that the guarantor-husband was also an "applicant" and that it was his creditworthiness, not the borrower's, that had to be examined to determine whether the wife's guaranty was properly required. *Id.* at 1115.

[21] The *Kline* court similarly acknowledged that under the statutory definition without more, the LLC-borrower was the only "applicant." But based on the FRB's re-definition, the court

(Continued on following page)

Crouch, 47 S.W.3d 371 (Mo. banc 2004);[22] *Eure v. Jefferson National Bank*, 448 S.E.2d 417 (Virginia 1994).[23] Thus, these cases do not actually "conflict" with the Eighth Circuit's decision in *Hawkins*, because the courts never actually addressed or decided the issue.

While state courts that are granted concurrent jurisdiction are not bound to agree with or apply the decisions of federal courts of appeals when interpreting federal law, *see Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n. 11, 117 S.Ct. 1055, 1064 n. 11 (1997), now that the issue has been squarely raised, it can hardly be questioned that given the opportunity to actually decide the issue, presumably with arguments from the litigants (something that

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found that the guarantor-spouses were also "applicants." *Id.* at 457-458.

[22] Contrary to Petitioners' assertion, in *Crouch*, the Missouri Supreme Court did not "find," let alone examine, whether the FRB's re-definition was a valid exercise of its regulatory authority. *Id.*

[23] In *Kline*, *Couch* and *Eure*, the courts held that a guarantor-spouse could assert an alleged ECOA-violation as an affirmative defense for recoupment or equitable estoppel based on illegality to avoid liability under her guaranty. *Kline*, 782 N.W.2d at 458-463; *Crouch*, 47 S.W.3d at 375-376; *Eure*, 448 S.E.2d 418-421 Although Petitioners do not make any argument regarding an illegality-defense directly in their petition, they attempted to do so in their briefing in the Eighth Circuit. Petitioners, however, waived that argument by failing to argue it in the District Court, and the Eighth Circuit did not address that waived argument on appeal. *See Cole*, 533 F.3d at 936; *Wilkens*, 742 F.3d at 360.

was missing in each of the foregoing cases), these courts may very well reconsider their earlier decisions. Because they should be permitted to do so, and because the Court will benefit from an earnest and intelligent discourse on the issue by these and other courts, Petitioners' request for certiorari should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

VALERIE J. HAWKINS and JANICE A. PATTERSON,	)	
Plaintiffs,	)	
	)	No. 12-CV-00670-DW
v.	)	(Filed Nov. 30, 2012)
COMMUNITY BANK OF RAYMORE,	)	
Defendant.	)	

ORDER

Pending before the Court is the Defendant Community Bank of Raymore's (the "Defendant") Motion to Strike Plaintiffs' Demand for a Jury Trial (the "Motion"). *See* Doc. 18. The Defendant filed suggestions in support of the Motion (Doc. 19), the Plaintiffs Valerie J. Hawkins ("Valerie") and Janice A. Patterson ("Janice") (collectively, the "Plaintiffs") filed suggestions in opposition (Doc. 20), and the Defendant filed a reply brief (Doc. 24). As explained below, the Plaintiffs contractually waived their right to a jury trial. Consequently, the Motion is GRANTED.

I.

A.

The following facts are primarily taken from the parties' briefs. Only those facts and issues necessary to decide the pending Motion are discussed below, and

they are simplified to the extent possible. The Defendant loaned PHC Development, LLC ("PHC") the principal sum of $2,077,900.00 so that PHC could acquire and develop a residential facility known as the Fox's Den Subdivision in Peculiar, Missouri. The principal amount is based on four separate loans, which were issued, modified, extended, and/or renewed a total of sixteen times. Both Plaintiffs guaranteed repayment of the four loans, as did their husbands, Gary A. Hawkins ("Gary") and Chris L. Patterson ("Chris"). Both Plaintiffs also executed new Commercial Guaranties in conjunction with the modifications, extensions, and/or renewals of the loans.

The Plaintiffs filed this suit on May 31, 2012. They allege in part that the Defendant wrongly required them to guaranty the loans simply because they were married to Gary and Chris, and that the Defendant "was required to evaluate the need for the claimed Guaranties signed by [Plaintiffs] without discriminating on the basis of marital status." Doc. 1, at ¶ 52. According to the Plaintiffs, this requirement violated the Equal Credit Opportunity Act ("ECOA"). The Defendant has declared a default on the loans, and filed a counterclaim for breach of the guaranties.

B.

Three of the original guaranties provided that arbitration was the preferred method of resolution, and did not include a provision waiving the right to a jury trial. Importantly, however, the modifications,

extensions, and/or renewals of the guaranties all contained an explicit jury trial waiver provision. *See* Doc. 4-1, p. 39 (Loan No. 9035923, dated 11/1/10); 4-1, p. 42 (same); Doc. 4-2, p. 96 (Loan 9037410, dated 11/1/10); 4-2, p. 99 (same); Doc. 4-1, p. 102 (Loan. No. 9036698, dated 6/15/09); 4-1, p. 105 (same); Doc. 4-2, p. 50 (Loan No. 9036970, dated 6/15/09); 4-2, p. 53 (same). These agreements state: "This Guaranty, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Guaranty."

The jury waiver provision provides that:

> WAIVE JURY. Lender and Guarantor hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by either Lender or Guarantor against the other.

Immediately below this waiver, the Commercial Guaranties state that: "EACH UNDERSIGNED GUARANTOR ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS GUARANTY AND AGREES TO ITS TERMS." The Commercial Guaranties also expressly provided that the Plaintiffs had an opportunity to be advised by their attorney.

C.

Despite these contractual provisions, the Plaintiffs' Complaint includes a demand for a jury trial. Doc. 1, p. 13. In the parties' Joint Proposed Scheduling Order/Discovery Plan, the Defendant stated that it intended on filing a motion to strike that demand.

Because the bench/jury trial issue would affect scheduling issues and deadlines, the Court directed the Defendant to file its motion. The motion was filed, has been fully briefed, and is ready for resolution.

II.

A party may waive by contract its right to a jury trial, and federal law governs the waiver analysis. *Westgate GV at the Woods, LLC v. Dickson,* 2010 WL 4721245, at * 2 (W.D. Mo. Nov. 15, 2010). "Jury trial waivers are common in loan agreements and loan guaranties and are regularly enforced." *Hillcrest Bank, N.A. v. Cordsen,* 2011 WL 2633273, at * 1 (W.D. Mo. July 5, 2011). The waiver must be "knowing and voluntary," and four primary factors should be considered: "(1) the relative bargaining power of the parties; (2) the sophistication of the parties; (3) the negotiability of the contract terms; and (4) the conspicuousness of the waiver provision." *Hardee's Food Sys., Inc. v. Hallbeck,* 2010 WL 4363420, at * 3 (E.D. Mo. Oct. 27, 2010). Each factor is addressed in turn.

A.

First, the Court must determine whether there was a "gross disparity in bargaining power." *Popular Leasing USA, Inc. v. Turner Constr. Co.,* 2005 WL 2874741, at * 1 (E.D. Mo. Oct. 31, 2005); *Boyd v. U.S. Bank Nat'l Ass'n.,* 2007 WL 2822518, at * 19 (D. Kan. Sept. 26, 2007) (recognizing that "the relevant inquiry is whether this disparity was 'gross'"). For example,

in *Westgate*, one of the non-moving parties claimed he could not "read above a second-grade level and lacked the sophistication to understand the jury waiver provision." *Westgate*, 2010 WL 4721245, at * 3. In enforcing the waiver, Judge Kays ruled that "a gross disparity in bargaining power did not exist between the parties because the Dicksons had the opportunity to consult with an attorney and negotiate the terms of each contract." *Id.* at * 4.

Here, the Plaintiffs expressly acknowledged in the Commercial Guaranties that "Guarantor has had the opportunity to be advised by Guarantor's attorney with respect to this Guaranty; [and] the Guaranty fully reflects Guarantor's intentions. " This acknowledgment undermines any notion of a gross disparity in bargaining power. *Westgate*, 2010 WL 4721245, at * 4. Any alleged disparity is also undermined because the loans were not for a necessity of life; they were issued to promote a commercial real estate development project. *See Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp., Inc.*, 56 F. Supp. 2d 694, 709 (E.D. La. 1999) ("The ability to take out a loan to start up a profit making cable company is not a necessity of life such that Defendant was compelled to accept Plaintiff's loan on whatever terms it was offered.") (citations and quotations omitted). For these reasons, the first factor weighs in favor of a knowing and voluntary waiver.

B.

Second, the Court must examine the sophistication of the non-moving party. This is because "[l]arge disparities in education and familiarity with the commercial processes can permit an overreaching party to turn the other party's lack of knowledge into an unfair advantage." *Boyd,* 2007 WL 2822518, at * 19. Here, Plaintiff Valerie Hawkins is an educated individual. She is a 1986 graduate of Northwest Missouri State University, and also received a Master of Science degree from the University of Central Missouri in 2011. Doc. 19-2, p. 52.

Among other business endeavors, Plaintiff Janice Patterson and her family members operate CLP Fox Trotters ("CLP"). CLP is a business that owns, breeds, and sells "one of the world's most popular gaited horses – the Fox Trotter." Doc. 19-2, p. 33-43. Under the circumstances, there are no large disparities in education or a lack of familiarity with commercial processes. And, even if there was such a disparity, the waiver in this case is "unambiguous and specialized knowledge or sophistication is not required to understand the jury waiver provision." *Westgate,* 2010 WL 4721245, at * 3 (citations and quotations omitted). For these reasons, the second factor also weighs in favor of a knowing and voluntary waiver.

C.

Third, the Court must consider whether the Plaintiffs had an opportunity to negotiate the terms

of the Guaranties. Here, the Plaintiffs do not argue that they even attempted to negotiate or otherwise alter any terms of the Guaranties. The Plaintiffs summarily claim they had "little opportunity" to consult an attorney or "otherwise analyze the contents of the personal guaranty prior to their execution." Doc. 20, p. 7. The Plaintiffs also claim they were unaware of the jury waiver provision. *See* Doc. 20-7, p. 2; Doc. 20-8, p. 2.

These conclusory statements made in litigation are directly contrary to what the Plaintiffs expressly agreed to in the guaranties. As discussed above, the Plaintiffs expressly agreed that they had read all of the terms (which would necessarily include the jury waiver), had agreed to all of the terms (which would necessarily include the jury waiver), and had an opportunity to consult an attorney. Finally, the Defendant argues (and the Plaintiffs have not shown otherwise) that the Plaintiffs' husbands (and co-guarantors) were able to negotiate some terms of the Guaranties. For these reasons, the third factor also weighs in favor of finding a knowing and voluntary waiver.

D.

Fourth, the Court must consider whether the waiver provision is conspicuous. A conspicuous waiver provision will more likely be enforced than a provision that is "buried in a lengthy document." *See Morris v. McFarland Clinic P.C.*, 2004 WL 306110, at

* 3 (S.D. Iowa Jan. 29, 2004). Here, the waiver provision is conspicuous. The Commercial Guaranties are only three pages in length, and the waiver provision is conspicuously titled "WAIVE JURY." The waiver provision states, clearly and unambiguously:

> WAIVE JURY. Lender and Guarantor hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by either Lender or Guarantor against the other.

Immediately below that provision is an acknowledgment that the guarantor has "read all the provisions of this guaranty and agrees to its terms." Under these circumstances, the fourth factor weighs in favor of finding a knowing and voluntary waiver. *Westgate*, 2010 WL 4721245, at * 4 (enforcing waiver in part because "the waiver was distinctly set apart in its own subparagraph, and the paragraph heading plainly read 'Waiver of Jury Trial.'").

III.

The Plaintiffs argue that a ruling on the Motion is premature because discovery could shed light on whether the waiver was made knowingly and voluntarily. They also suggest that the Defendant "unilaterally slip[ped] a jury trial waiver into later guaranties without discussing such an alteration with Plaintiffs." Doc. 20, p. 5. These arguments are not persuasive.

In fact, this is not a close call. By signing the Commercial Guaranties, the Plaintiffs expressly

acknowledged that they read and understood all of the provisions, that they had an opportunity to discuss those provisions with their attorney, and expressly agreed to the jury waiver. *See, e.g., Popular Leasing USA, Inc.*, 2005 WL 2874741, at * 2 (recognizing that "a party who signs a contract is presumed to have knowledge of its contents"). This Court will not allow the Plaintiffs to evade the agreed-upon waiver simply because they no longer wish to be bound by it.

Nor have the Plaintiffs shown how any discovery could alter the foregoing analysis. They have not alleged that they were fraudulently induced into the jury waiver, or explained how discovery could show that the waiver was not knowing or voluntary. As a result, the Motion is not premature and further discovery is not necessary to resolve it. *See Hillcrest Bank*, 2011 WL 2633273, at * 1 (enforcing jury waiver even though non-moving party argued that issues of fact were unresolved).[1]

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[1] The Plaintiffs argue that a jury trial is required in cases brought under the ECOA. *See* 15 U.S.C. § 1691(a). The Plaintiffs then claim that "[l]ittle to no case law discusses the intersection between a right to a jury trial under ECOA and whether it can be waived." Doc. 20, p. 3. But the case the Plaintiffs cite for this alleged lack of case law expressly held that "the ECOA claim falls within the scope of the jury waiver provision and the court finds that the jury waiver applies to the instant case." *Boyd*, 2007 WL 2822518, at * 20.

IV.

For the reasons set forth above, it is hereby ORDERED that the Defendant's Motion to Strike Plaintiffs' Demand for a Jury Trial (Doc. 18) is GRANTED, and the Court STRIKES the Plaintiffs' demand for a jury trial. The Plaintiffs' request for an oral argument is denied as unnecessary.

IT IS SO ORDERED.

Date:
November 29, 2012

/s/ Dean Whipple
Dean Whipple
United States District Judge

No. 14-520

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

VALERIE J. HAWKINS and
JANICE A. PATTERSON,

Petitioners,

v.

COMMUNITY BANK OF RAYMORE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONERS' REPLY BRIEF

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REASONS FOR GRANTING THE PETITION

I. Congress does not enact meaningless legislation prohibiting discrimination against persons which can never be enforced. An ECOA "applicant" includes corporate entities which have no race, gender, or marital status, making it impossible to discriminate against these corporate entities without considering those persons with whom it is affiliated. The Eighth Circuit's flawed ECOA interpretation concludes that lenders may lawfully deny credit based on the race, gender, marital status, age or religion of individuals owning small corporations without violating the ECOA, opening the floodgates to lender discrimination against closely-held business owners without consequence.

The *Hawkins* concurring opinion trumpeted by CBR leaves the ECOA's discriminatory prohibitions against small corporations meaningless.[1] The *Hawkins* concurrence reasoned that a corporate-borrower qualifies as an ECOA credit "applicant," but not the individuals standing behind the entity. A corporate entity has no race, gender, marital status, age, or religion. Under the concurring *Hawkins* opinion,

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[1] The arguments raised here by CBR are the genre now to be faced by ECOA claimants based upon *Hawkins*' imprecise reasoning.

lenders can deny credit to women-owned or minority-owned small corporations based on gender or race, but the woman or minority owner directly impacted has no ECOA standing; only the borrower-corporation, as "applicant" has ECQA standing. This enables lenders to discriminate against owners based on race, gender, marital status, age, or religion without ECOA violation. Small corporation owners now are subject to the obvious discriminatory pretext that the corporation has no race or gender, and thus cannot be discriminated against. Review is necessary to halt this end run on the ECOA.

A. The *Hawkins* concurrence concludes that only entity-borrowers qualify as "applicants," not individuals.

The *Hawkins* concurrence concludes that the ECOA unambiguously defines "applicant" as "the single person to whom credit would be extended, not a third party asking on behalf of the putative debtor." *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937, 943 (8th Cir. 2014) (Colloton, C.J., concurring). According to the concurring *Hawkins* opinion, the ECOA "specifically envisions the involvement of a third party who requests an extension of credit to a first-party applicant, but distinguishes between the third party requestor and the 'applicant.'" *Id.* at 944. The *Hawkins* concurrence concludes that the "'applicant' is the party to whom credit will be extended"; therefore, only the corporate borrower qualifies as an ECOA credit applicant. *Id.*

The ECOA, however, prohibits discrimination "against *any* applicant" on the basis of "race, color, religion, national origin, sex or marital status, or age." 15 U.S.C. § 1691(a)(1). The statute's text does not say "against *the* applicant."[2] The ECOA expressly recognizes that a "person" under the definition of "applicant" includes "a corporation trust, estate, partnership, cooperative, or association." 15 U.S.C. § 1691a(f). Who constitutes a "cooperative" or "association"? If condominium owners who are primarily minorities form a non-profit corporation to manage the "association" which is denied credit, is the race-less, non-profit corporation the "putative debtor" and only party with standing? When the race-less, non-profit association brings a claim for ECOA race discrimination, will they not face the specious arguments under the "putative debtor" pretext that a corporation has no race, and therefore cannot assert a claim? Are the actual condominium owners who comprise the non-profit corporation the real parties who have suffered discrimination?

This suspect reasoning highlights the ECOA's inherent ambiguity when a corporation, association, cooperative, or other entity requests credit. If only the entity-borrower can be an "applicant," who possesses the race, gender, marital status, age, or religion of the

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[2] The *Hawkins* concurrence draws support for the use of definite articles, but ignores the omission of definite articles here. *See Hawkins*, 761 F.3d at 943.

entity-borrower? Neither the ECOA nor *Hawkins* answers these critical questions.

B. The *Hawkins* concurring opinion's ECOA interpretation permits lenders to deny credit to closely-held corporations based on the business owner's race, gender, marital status, age, or religion. Such an interpretation renders the ECOA meaningless.

The *Hawkins* concurrence's ECOA interpretation ignores business realities and excludes closely-held business owners from ECOA protection. Small business owners routinely request credit for their closely-held corporate entities, and banks extend loans largely based on collateral pledged and the business owners' guaranties. Lenders deal with individuals who own these small corporations, not the faceless, race-less, genderless entity.

The ECOA makes it unlawful for lenders to "discriminate against *any applicant*." Under the concurring *Hawkins*' reasoning, the entity-borrower is *the sole applicant*. Since the entity-borrower has no race, gender, marital status, or religion, a lender can deny credit to the entity-borrower on prohibited grounds, and the owners standing behind the entity-borrower and directly impacted by the discriminatory conduct have no ECOA protection.

For example, utilizing the Eighth Circuit's reasoning, a lender could deny credit to a minority-owned,

closely-held corporation based on the owner's race without violating the ECOA; the race-neutral corporation is *the only* ECOA credit applicant entitled protection. The rationale is hollow at best because the lender cannot discriminate against a corporate entity which has no race; the minority business owner discriminated against lacks ECOA protections. The statute becomes meaningless.

This Court should not wait for Congress to act. While waiting, countless credit discrimination acts will likely follow *Hawkins*' imprecise conclusions. Review is necessary to preserve the ECOA's protections.

C. Legislatures do not enact meaningless legislation. If the entity-borrower is the sole ECOA "applicant," then the ECOA's protections are meaningless since the entity-borrower has no race, gender, age, or ethnicity.

A presumption exists that legislatures do not enact useless or meaningless legislation. *Corley v. United States*, 556 U.S. 303, 314, 129 S.Ct. 1558, 1566 (2009) ("The Government's reading is thus at odds with one of the most basic interpretive canons, that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" (internal quotation marks omitted)). Yet, the *Hawkins* concurrence renders much of the ECOA meaningless. If the entity-borrower is the sole ECOA "applicant,"

then the ECOA's protections are meaningless since the entity-borrower has no race, gender, age, or ethnicity and cannot be discriminated against.

Further, the *Hawkins* concurrence runs counter to the ECOA reporting requirements. The reporting requirements mandate that lenders "compile and maintain" information on "women-owned" and "minority-owned" credit applications, including the "race, sex, and ethnicity of the principal owners of the business." 15 U.S.C. § 1691c-2(b) and (e)(2)(G). CBR, however, argues that 15 U.S.C. § 1691c-2(3)'s prohibition on including the "name, specific address . . and telephone number concerning any individual who is, or is connected with, the women-owned, minority-owned" business loan somehow illustrates that the ECOA unambiguously excludes guarantors from protection. *See* Brief in Opposition at 34.

CBR's argument and the *Hawkins* concurrence overlook the obvious: the ECOA expressly requires race and gender information germane to discriminatory conduct by identifying the individual race and gender for persons standing behind the entity-borrower. Contrary to CBR's suggestion, the ECOA's reporting requirements illustrate Congress's recognition that the ECOA's discriminatory prohibition cannot be measured without considering the race, gender, and ethnicity of the individuals "connected with" the entity-borrower. Limiting the ECOA's protections to only the entity-borrower renders the ECOA meaningless.

II. CBR suggests this Court should deny review based on alternative arguments when no decision was ever rendered by the district court or the Eighth Circuit on these issues. CBR's "alternative" grounds consist of attacks on Petitioner Valerie Hawkins for the first time on appeal. CBR claims that Valerie Hawkins "represented" and "waived" matters buried in boiler-plate provisions in her guaranties. CBR's "alternative" grounds have no bearing on this Court's decision to grant review.

CBR argues this Court should deny certiorari because alternative grounds not addressed by lower courts bar Petitioners' recovery. *See* Brief in Opposition at 14-21. CBR cites Justice Thomas's dissent in denying certiorari in *Noriega v. Pastrana*. 559 U.S. 917, 130 S.Ct. 1002, 1009 (2010) (Thomas, J., dissenting). Contrary to CBR's assertion, Justice Thomas did not argue against granting certiorari because the Eleventh Circuit's opinion is sustainable on alternative grounds. *Id.* Justice Thomas advocated *granting* certiorari "no matter what we conclude on the merits" so as to "avoid years of litigation and uncertainty." *Id.* Here, the Court should similarly grant certiorari to avoid years of litigation and uncertainty concerning the ECOA's application to spousal guarantors, and future uncertainty created by the imprecise *Hawkins* ruling.

Yet, CBR claims for the first time on appeal that Valerie Hawkins made "representations" and "waivers"

which preclude ECOA protection. Valerie Hawkins made no such "representations" or "waivers." Rather, CBR inconspicuously buried boiler-plate language in Ms. Hawkins' guaranties, required her to sign, and now claims she made binding representations by citing the boiler-plate language out of context.

A. CBR violated the ECOA by requiring PHC to obtain Valerie Hawkins' guaranties. Valerie Hawkins did not "voluntarily" provide guaranties as CBR suggests.

CBR claims Valerie Hawkins "represented on *sixteen* separate occasions that [her] guaranties were being provided *'at the request of PHC.'*" *See* Brief in Opposition at 14. CBR concludes that Valerie Hawkins "voluntarily" provided her guaranties. *Id.* at 15. Valerie Hawkins' "representations" are boiler-plate provisions CBR buried in a three-page, legal-sized, single-spaced, eight-point font guaranty. The buried, boiler-plate provisions state that Valerie Hawkins executed guaranties "at [PHC]'s request." CBR fails to mention, however, that it *required PHC to obtain Valerie Hawkins' guaranties* as a condition for extending credit. Valerie Hawkins did not "volunteer" her guaranties, rather CBR required her signatures through PHC in violation of 12 C.F.R. § 202.7(d)(1) and (5).

B. CBR understood Valerie Hawkins has no economic interest in PHC. CBR did not rely on boiler-plate guaranty provisions claiming Valerie Hawkins' "substantial economic interest" in PHC.

CBR accuses Valerie Hawkins of "representing" she had a "substantial economic interest in [PHC]" to induce CBR's extension of credit. *See* Brief in Opposition at 16. In reality, CBR inconspicuously buried this boiler-plate language in single-space, non-bolded, eight-point font located only in the first three of sixteen guaranties. CBR understood Valerie Hawkins had no financial interest in PHC. CBR reviewed PHC's Operating Agreement and Articles of Organization which do not reference Valerie Hawkins as PHC's member, officer, or employee. CBR failed to mention any interest claimed by Ms. Hawkins in any loan memoranda in CBR's files. CBR cannot credibly claim reliance on boiler-plate guaranty language suggesting Valerie Hawkins' fictional "economic interest" in PHC. CBR's loan files directly contradict this unsubstantial assertion.

C. Valerie Hawkins did not waive ECOA protections. CBR cites guaranty "waiver" provisions out of context by not including qualifying language which limits their application to defenses for suretyship, impairment of collateral, and setoffs. Valerie Hawkins' ECOA claims and defenses are not based on suretyship or impairment of collateral, and were not waived.

CBR further asserts that Valerie Hawkins knowingly waived ECOA protections stating: "Petitioners waived any defenses given to guarantors at law or in equity other than actual payment and performance of the indebtedness and waived and agreed not to assert 'any claim of setoff, counterclaim, counter demand, recoupment or similar right.'" Brief in Opposition at 20. CBR's license with the waiver language is remarkable. The section contains three divided paragraphs. CBR does not rely on any language from the first paragraph. CBR only quotes one phrase – not a complete sentence – from the second paragraph: "any defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness." *See* Brief in Opposition at 20.

CBR fails to mention that this phrase is one of six clauses, (A) through (F) in the second paragraph, which is preceded by the following introductory and qualifying language:

> Guarantor also waives any and all rights or defenses based on suretyship or impairment

> of collateral including, but not limited to, any rights or defenses arising by reason of.

Valerie Hawkins does not claim a right or defense based on suretyship or impairment of collateral. The ECOA has nothing to do with those defenses. CBR's waiver argument is unavailing and misleading.

CBR also suggests the last paragraph of the waiver section applies. Again, CBR brazenly editorializes the language. The qualifying clause sets out that the paragraph applies to any claimed deductions to the amount guaranteed. Valerie Hawkins is not claiming any deductions. Valerie Hawkins claims her guaranties do not exist because they are illegal.

CBR raised the above-described "alternative grounds" for the first time in its Eighth Circuit appellate brief. The Eighth Circuit declined to mention or rule on CBR's "alternative grounds." *See Hawkins*, 761 F.3d at 937-45. CBR asks this Court to refrain from resolving important federal questions dividing the Eighth and Sixth Circuits based on alternative arguments raised for the first time on appeal. This Court should decline CBR's invitation.

III. Disagreement between the Sixth and Eighth Circuits warrants Supreme Court review of whether ECOA "applicants" for "any aspect of a credit transaction" unambiguously excludes spousal guarantors. CBR's Brief in Opposition acknowledges this split and highlights the need for review on this important matter.

CBR recognizes that a circuit split persists between the Sixth and Eighth Circuits. *See* Sup. Ct. R. 10; Brief in Opposition at 21-32. Indeed, CBR spends much of its brief understandably extolling the Eighth Circuit's opinion to advocate its cause while accusing the Sixth Circuit of "manufacturing ambiguity to impose its own view." *See* Brief in Opposition at 21-32. CBR argues the Eighth Circuit correctly denied spousal guarantors standing as ECOA credit "applicants," whereas the Sixth Circuit erred by finding the ECOA's definition of "applicant" "broad enough to capture a guarantor." *Id.* CBR fails to articulate why this Court should allow a clear circuit split to persist.

CBR's criticism of the Sixth Circuit lacks merit. An "applicant" applies for "credit." 15 U.S.C. § 1691a(b). "The term 'credit' means the right granted by a creditor to a debtor" as identified by the Sixth Circuit. *See RL BB Acquisition, LLC v. Bridgemill Commons Development Group, LLC*, 754 F.3d 380, 385 (6th Cir. 2014); 15 U.S.C. § 1691a(d). The ECOA does not define "debtor," but the "overwhelming majority of courts" hold that a "guarantor is a debtor" within the meaning of Article 9 of the Uniform

Commercial Code. *U.S. v. Kelley*, 890 F.2d 220, 223 (10th Cir. 1989) (quoting *In re Kirkland*, 91 B.R. 551, 553 (Bankr. 9th Cir. 1988) and citing additional authority from Alabama, California, Hawaii, Iowa, Massachusetts, Minnesota, Missouri, New York, North Dakota, Pennsylvania, and Vermont).

The "ECOA prohibits discrimination 'with respect to *any aspect* of a credit transaction,' 15 U.S.C. § 1691(a)," and has "broad remedial goals." *RL BB Acquisition*, 754 F.3d at 385 (emphasis in original). Contrary to CBR's suggestion, the Sixth Circuit did not impermissibly conclude that a lender-required, spousal guarantor who is a "debtor" involved "in any aspect of a credit transaction" has standing to bring ECOA claims.

CBR insists there is "nothing exceptional" about the fundamental disagreement between the Sixth and Eighth Circuit, yet accuses the Sixth Circuit of "ignor[ing] basic rules of statutory construction and its prior holding in order to manufacture an ambiguity." *See* Brief in Opposition at 21-22. CBR further accuses the Sixth Circuit of "stretching to find an ambiguity," reaching "illogical conclusions," and eschewing precedent to remake the law to its liking. *Id.* at 29-30. CBR's Eighth Circuit support and Sixth Circuit criticism only highlight the obvious: a clear split exists which requires this Court's review.

Alaska, Iowa, Missouri, and Virginia state supreme court opinions directly conflict with the Eighth Circuit. Each state affords spousal guarantors ECOA

standing. *See Still v. Cunningham*, 94 P.3d 1104 (Alaska 2004); *Bank of the West v. Kline*, 782 N.W.2d 453 (Iowa 2010);[3] *Boone Nat. Sav. & Loan Ass'n v. Crouch*, 47 S.W.3d 371 (Mo. 2001); *Eure v. Jefferson National Bank*, 448 S.E.2d 417 (Va. 1994). CBR recognizes that federal court decisions which interpret federal law do not bind state courts. *See* Brief in Opposition at 37 (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11, 117 S.Ct. 1055, 1064 n.11 (1997)). Spousal guarantors in Iowa or Missouri are therefore afforded ECOA protection in state courts, but not federal district courts.[4] This Court should grant certiorari to resolve the conflict between the Eighth Circuit and the state supreme courts in Alaska, Iowa, Missouri, and Virginia. *See* Sup. Ct. R. 10(a).

CONCLUSION

For these reasons and those in Petitioners' Petition for Writ of Certiorari, this Court should grant review to reverse the Eighth Circuit Court of Appeals'

[3] The Iowa Supreme Court decided *Kline* in 2010, three years after the Seventh Circuit applied its *Chevron* analysis in *Moran Foods v. Mid-Atlantic Market Development*, 476 F.3d 436 (7th Cir. 2007).

[4] Iowa and Missouri are both in the Eighth Circuit's jurisdiction. Iowa and Missouri federal courts are bound to follow Eighth Circuit law, whereas the state courts are bound to follow state case law. Review is necessary to prevent uneven application of law and forum shopping.

holding that the ECOA's definition of "applicant" unambiguously excludes guarantors. Petitioners also request remand of this proceeding to the District Court for resolution on the merits. Due to the complex statutory and regulatory scheme at issue, Petitioners respectfully request the Court to invite the Solicitor General to file a brief in this case expressing the views of the United States.

Respectfully submitted,

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Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit**

JOINT APPENDIX

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Petition For Certiorari Filed November 3, 2014
Certiorari Granted March 2, 2015

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U.S. District Court
Western District of Missouri (Kansas City)
CIVIL DOCKET FOR CASE #: 4:12-cv-00670-DW

Date	No.	DOCKET TEXT
05/31/2012	1	COMPLAINT against Community Bank of Raymore filed by Thomas J Hamilton on behalf of All Plaintiffs. Filing fee $350, receipt number 0866-3110094. Service due by 10/1/2012. (Attachments: # 1 Exhibit Exhibits A-Z, # 2 Civil Cover Sheet Civil Cover Sheet) (Hamilton, Thomas) (Entered: 05/31/2012)
		* * *
07/13/2012	3	ANSWER to 1 Complaint, *with Affirmative Defenses* on behalf of Community Bank of Raymore.(Maher, Robert) (Entered: 07/13/2012)
07/13/2012	4	COUNTERCLAIM *of Community Bank of Raymore* against All Plaintiffs (Attachments: # 1 Exhibits A through Z, # 2 Exhibits AA through ZZ) (Maher, Robert) Modified on 7/16/2012 – To correct docket text (Anderson, Christy). (Entered: 07/13/2012)
		* * *

08/10/2012	8	ANSWER to Counterclaim on behalf of Valerie J. Hawkins, Janice A. Patterson.(Ballew, David) (Entered: 08/10/2012)

* * *

01/22/2013	34	MOTION for summary judgment filed by Greer Shirreffs Lang on behalf of Community Bank of Raymore. Suggestions in opposition/response due by 2/15/2013 unless otherwise directed by the court (Lang, Greer) (Entered: 01/22/2013)
01/22/2013	35	SUGGESTIONS in support re 34 MOTION for summary judgment filed by Greer Shirreffs Lang on behalf of Counter Claimant Community Bank of Raymore, Defendant Community Bank of Raymore. (Attachments: # 1 Exhibit 1 (Part1), # 2 Exhibit 1 (Part 2), # 3 Exhibit 2, # 4 Exhibit 3 (Part 1), # 5 Exhibit 3 (Part 2), # 6 Exhibit 4)(Related document(s) 34) (Lang, Greer) (Entered: 01/22/2013)

* * *

02/07/2013	40	Amended COUNTERCLAIM against Valerie J. Hawkins, Janice A. Patterson (Attachments: # 1 Exhibit A-Z, # 2 Exhibit AA-ZZ)(Lang, Greer) (Entered: 02/07/2013)

* * *

2/22/2013	50	SUGGESTIONS in opposition to motion for summary judgment re 34 MOTION for summary judgment filed by David Lewis Ballew on behalf of Counter Defendants Valerie J. Hawkins, Valerie J. Hawkins, Janice A. Patterson, Janice A. Patterson, Plaintiffs Valerie J. Hawkins, Janice A. Patterson. Reply suggestions due by 3/11/2013 unless otherwise directed by the court. (Attachments: # 1 Exhibit Exhibit A, # 2 Exhibit Exhibit B, # 3 Exhibit Exhibit C, # 4 Exhibit Exhibit D, # 5 Exhibit Exhibit E, # 6 Exhibit Exhibit F)(Related document(s) 34) (Ballew, David) (Entered: 02/22/2013)

* * *

03/06/2013	61	*Plaintiffs'* ANSWER to Counterclaim on behalf of Valerie J. Hawkins(Individually), Janice A. Patterson(Individually).(Ballew, David) (Entered: 03/06/2013)

* * *

3/18/2013	64	REPLY SUGGESTIONS to motion re 34 MOTION for summary judgment filed by Greer Shirreffs Lang on behalf of Counter Claimants Community Bank of Raymore, Community Bank of Raymore, Defendant Community Bank of Raymore. (Attachments: # 1 Exhibit 5, # 2 Exhibit 6, # 3 Exhibit 7, # 4 Exhibit 8) (Related document(s) 34) (Lang, Greer) (Entered: 03/18/2013)

* * *

05/16/2013	68	ORDER – It is hereby ORDERED that the Defendant Community Bank of Raymore's Motion for Summary Judgment (Doc. 34) is GRANTED. Signed on 05/17/2013 by District Judge Dean Whipple. (Willis, Kathy) (Entered: 05/16/2013)
05/31/2013	69	MOTION for summary judgment *on its counterclaims for breach of Guaranties & Plaintiffs' Affirmative Defenses* filed by Greer Shirreffs Lang on behalf of Community Bank of Raymore. Suggestions in opposition/response due by 6/24/2013 unless otherwise directed by the court (Lang, Greer) (Entered: 05/31/2013)

05/31/2013	70	SUGGESTIONS in support re 69 MOTION for summary judgment *on its counterclaims for breach of Guaranties & Plaintiffs' Affirmative Defenses* filed by Greer Shirreffs Lang on behalf of Counter Claimants Community Bank of Raymore, Community Bank of Raymore, Defendant Community Bank of Raymore. (Attachments: # 1 Index Exhibit Index, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6, # 8 Exhibit 7, # 9 Exhibit 8, # 10 Exhibit 9, # 11 Exhibit 10, # 12 Exhibit 11, # 13 Exhibit 12, # 14 Exhibit 13, # 15 Exhibit 14, # 16 Exhibit 15, # 17 Exhibit 16, # 18 Exhibit 17, # 19 Exhibit 18, # 20 Exhibit 19, # 21 Exhibit 20, # 22 Exhibit 21, # 23 Exhibit 22, # 24 Exhibit 23, # 25 Exhibit 24, # 26 Exhibit 25, # 27 Exhibit 26, # 28 Exhibit 27, # 29 Exhibit 28, # 30 Exhibit 29, # 31 Exhibit 30, # 32 Exhibit 31, # 33 Exhibit 32, # 34 Exhibit 33, # 35 Exhibit 34, # 36 Exhibit 35, # 37 Exhibit 36, # 38 Exhibit 37 Part 1, # 39 Exhibit 37 Part 2, # 40 Exhibit 37 Part 3, # 41 Exhibit 38, # 42 Exhibit 38A, # 43 Exhibit 39, # 44 Exhibit 40, # 45 Exhibit 41, # 46 Exhibit 42, # 47 Exhibit 43, # 48

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* * *

06/24/2013 79 SUGGESTIONS in opposition to motion for summary judgment re 69 MOTION for summary judgment *on its counterclaims for breach of Guaranties & Plaintiffs' Affirmative Defenses* filed by David Lewis Ballew on behalf of Counter Defendants Valerie J. Hawkins, Valerie J. Hawkins, Janice A. Patterson, Janice A. Patterson, Plaintiffs Valerie J. Hawkins, Janice A. Patterson. Reply suggestions due by 7/18/2013 unless otherwise

directed by the court. (Attachments: # 1 Notice of Exhibit Attachment, # 2 Index)(Related document(s) 69) (Ballew, David) Modified on 7/2/2013 to acknowledge receipt of exhibits in Clerk's office (McDowell, Shelly). (Additional attachment(s) added on 9/12/2013: # 3 Exhibit 113 thru 116, # 4 Exhibit 112, # 5 Exhibit 111, # 6 Exhibit 90 thru 110, # 7 Exhibit 72 thru 89, # 8 Exhibit 63 thru 71, # 9 Exhibit 62, # 10 Exhibit 61, # 11 Exhibit 34 thru 60, # 12 Exhibit 30 thru 33, # 13 Exhibit 10 thru 29, # 14 Exhibit 9 part 1, # 15 Exhibit 9 part 2, # 16 Exhibit 6 thru 8, # 17 Exhibit 5, # 18 Exhibit 1 thru 4) (Crespo, Wil). Modified on 9/12/2013 (Crespo, Wil). The exhibits, which were originally referred to in the Notice of Exhibit Attachment, were scanned and attached to the filing on 9/12/13. There are no exhibits to this filing being kept in the Clerk's Office. (Entered: 07/01/2013)

* * *

07/18/2013 81 REPLY SUGGESTIONS to motion re 69 MOTION for summary judgment *on its counterclaims for breach of Guaranties*

		& Plaintiffs' Affirmative Defenses filed by Greer Shirreffs Lang on behalf of Defendant Community Bank of Raymore. (Related document(s) 69) (Lang, Greer) (Entered: 07/18/2013)
		* * *
08/30/2013	103	ORDER OF DISMISSAL – It is hereby ORDERED that the Community Bank of Raymore's First Amended Counterclaim (Doc. 40) is DISMISSED WITHOUT PREJUDICE. The Clerk of Court shall mark this case as CLOSED. Signed on 08/30/2013 by District Judge Dean Whipple. (Willis, Kathy) (Entered: 08/30/2013)
09/06/2013	104	CLERK'S JUDGMENT. (Moore, Terri) (Entered: 09/06/2013)
09/10/2013	105	AMENDED CLERK'S JUDGMENT. (Moore, Terri) (Entered: 09/10/2013)

9/13/2013	106	NOTICE OF APPEAL as to 68 Order on Motion for Summary Judgment, 25 Order on Motion to Strike by Valerie J. Hawkins(Individually), Janice A. Patterson(Individually). Filing fee $ 455, receipt number 0866-3669130. (Ballew, David) (Entered: 09/13/2013)

* * *

General Docket
Eighth Circuit Court of Appeals

Court of Appeals **Docketed:** 09/18/2013
Docket #: 13-3065 **Termed:** 08/05/2014
Nature of Suit: 3480 Consumer Credit
Valerie Hawkins, et al v. Community Bank of Raymore
Appeal From: U.S. District Court for the Western District of Missouri – Kansas City
Fee Status: paid – cs

Case Type Information:
1) Civil
2) Private
3) null

Originating Court Information:
District: 0866-4 : 4:12-cv-00670-DW
Trial Judge: Dean Whipple, U.S. District Judge
Date Filed: 05/31/2012
Date Order/Judgment: 09/10/2013 **Date NOA Filed:** 09/13/2013
Date Rec'd COA: 09/16/2013

DATE	DOCKET TEXT
11/05/2013	**BRIEF FILED** – APPELLANT BRIEF filed by Valerie J. Hawkins and Janice A. Patterson. w/service 11/04/2013, Length: 10,496 words. **10 COPIES OF PAPER BRIEFS FROM Valerie J. Hawkins and Janice A. Patterson due 11/12/2013 WITH revised certificate of service for paper briefs.**

Brief of Community Bank of Raymore due on 12/05/2013 [4092850] [13-3065] (MDS)

11/05/2013 **ADDENDUM** of APPELLANT FILED by Appellants Valerie J. Hawkins and Janice A. Patterson, w/service 11/04/2013 [4092882] [13-3065] (MDS)

11/06/2013 RECORD FILED – JOINT APPENDIX, 4 volumes, 2 boxes [4093930] [13-3065] (MDS)

* * *

1/02/2014 **BRIEF FILED** – APPELLEE BRIEF filed by Community Bank of Raymore, w/service 12/30/2013, Length: 13,962 words 10 COPIES OF PAPER BRIEFS FROM Community Bank of Raymore due 01/07/2014 WITH revised certificate of service for paper briefs. Reply brief of Valerie J. Hawkins and Janice A. Patterson due on 01/16/2014. [4110528] [13-3065] (SRD)

* * *

1/28/2014 **BRIEF FILED** – APPELLANT REPLY BRIEF filed by Valerie J. Hawkins and Janice A. Patterson w/service 01/27/2014, Length: 6928 words.

10 COPIES OF PAPER BRIEFS FROM Valerie J. Hawkins and Janice A. Patterson due 02/03/2014 WITH revised certificate of service for paper briefs [4118238] [13-3065] (MDS)

* * *

04/17/2014	**ARGUED & SUBMITTED in St. Louis** to Judges Lavenski R. Smith, Steven M. Colloton, Raymond W. Gruender on 04/17/2014. Mr. John M. Duggan for Appellants Valerie J. Hawkins and Janice A. Patterson. Ms. Greer Shirreffs Lang for Appellee Community Bank of Raymore. Rebuttal by Mr. John M. Duggan for Valerie J. Hawkins and Janice A. Patterson RECORDED [4144868] [13-3065] (CMD)
6/18/2014	28(j) citation filed by Appellants Valerie J. Hawkins and Janice A. Patterson w/service 06/18/2014 – FOR CAL [4166293] [13-3065] (DLB)
08/05/2014	OPINION FILED – THE COURT: Lavenski R. Smith, Steven M. Colloton and Raymond W. Gruender AUTHORING JUDGE: Raymond W. Gruender (PUBLISHED), CONCUR BY: Steven M. Colloton [4182560] [13-3065] (DMS)
08/05/2014	**JUDGMENT FILED** – The judgment of the Originating Court is AFFIRMED in accordance with the opinion. LAVENSKI R. SMITH, STEVEN M. COLLOTON and RAYMOND W. GRUENDER Hrg Apr 2014 [4182562] [13-3065] (DMS)
8/26/2014	MANDATE ISSUED. [4189518] [13-3065] (DMS)

* * *

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 13-3065

Valerie J. Hawkins, Individually;
Janice A. Patterson, Individually

Plaintiffs-Appellants

v.

Community Bank of Raymore

Defendant-Appellee

Appeal from U.S. District Court for the
Western District of Missouri – Kansas City
(4:12-cv-00670-DW)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

August 05, 2014

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 13-3065

Valerie J. Hawkins, Individually
and Janice A. Patterson, Individually

Appellants

v.

Community Bank of Raymore

Appellee

Appeal from U.S. District Court for the
Western District of Missouri – Kansas City
(4:12-cv-00670-DW)

MANDATE

In accordance with the opinion and judgment of 08/05/2014, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

August 26, 2014

Clerk, U.S. Court of Appeals, Eighth Circuit

No. 14-520

In The
Supreme Court of the United States

VALERIE J. HAWKINS and
JANICE A. PATTERSON,

Petitioners,

v.

COMMUNITY BANK OF RAYMORE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Do primarily, absolutely, and unconditionally liable spousal guarantors within the ECOA zone of interests protected have statutory standing as "applicants" to sue if ECOA violations proximately caused them damage?

2. If Congress did not precisely answer whether "applicant with respect to any aspect of a credit transaction" includes persons primarily, absolutely, and unconditionally liable for the applied-for loan as guarantors, did the Federal Reserve Board have authority under the ECOA to include by regulation spousal guarantors as "applicants" to further the purposes of eliminating discrimination against married women?

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ARGUMENT 16

I. Parties possess statutory standing where their claims fall within a statute's "zone of interests" protected, and the damages claimed are proximately caused by the statutory violations. The ECOA's zone of interests protects the Wives against marital status discrimination in requiring the Wives co-sign and/or guaranty their husbands' business debts, and CBR's ECOA violations proximately caused the Wives' damages. The Wives possess ECOA statutory standing to sue 16

A. The ECOA prohibits requiring spouses to co-sign or guaranty debts. The Wives' Complaint claims CBR required the Wives co-sign and/or guaranty their husbands' business debt. The Wives' claims fall squarely within the ECOA protections 16

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B. Statutory standing requires falling within the "zone of interests" protected by the statute. The ECOA's broad purposes include eliminating marital status discrimination in credit transactions. The Wives' marital status discrimination claims fall within the ECOA's protected zone of interests 19

1. Expressed legislative purposes clarify the statute's zone of protected interests. The ECOA's expressed purpose requires making credit available without marital status discrimination, including requiring spouses to co-sign and/or guaranty loans 20

2. Traditional statutory construction rules show that ECOA "applicants" include "debtors" contractually liable to pay the applied-for credit. CBR claims the Wives are "debtors" with contractual obligations to pay the applied-for debts. The Wives are "debtor-applicants" possessing ECOA standing 24

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a. A governing text's words are of paramount concern, and what they convey in their context is what they mean. The ECOA's text shows that primarily, absolutely, and unconditionally liable guarantors contractually obligated to repay the applied-for debt are "applicants" who apply for "credit." The Wives are therefore "debtor-applicants" possessing ECOA standing 25

b. Statutory text must be construed as a whole considering the statute's purpose and context. Construing the ECOA's text as a whole shows persons primarily, absolutely, and unconditionally liable to repay the applied-for debts are "applicants." 28

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i. "Applicant" must be viewed in context which shows it includes those persons contractually liable to pay including small business owners who co-sign debts. Small business corporation "applicants" have no race, gender, or marital status providing no discriminatory basis upon which they can be denied credit. "Applicant" means persons in addition to the named borrowing entity agreeing to repay the applied-for debt..... 29

ii. ECOA data collection requirements show that "applicants" include persons identified with or connected to the credit transaction. Persons owning small businesses and persons agreeing to repay the applied-for debts are identified with and connected to the credit transaction..... 31

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c. Statutory interpretations that validate outweigh interpretations that invalidate because legislatures don't enact meaningless laws 33

d. The Wives "applied" under the ECOA to CBR for extensions, renewals, and continuations of credit as co-signors and/or guarantors primarily, absolutely, and unconditionally liable to repay the applied-for Loans. The Wives were "applicants" for renewal falling within the ECOA's "zone of interests." 34

C. The Eighth Circuit's *Hawkins* decision ignores the plain, ordinary meaning of the ECOA to reach an untenable conclusion 35

1. The Eighth Circuit reached the untenable conclusion that illegal contracts violating the ECOA can't be challenged by the Wives because they aren't "applicants." 36

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2. The Eighth Circuit's interpretation of "applicant" impermissibly narrows the ECOA's protection to only the borrowing entity that approaches the lender, and leaves individual minority business owners unprotected against discrimination because they don't meet the Eighth Circuit's technical definition of "applicant." The Sixth Circuit's interpretation correctly concludes additional persons/entities offering promises supporting an application can be "applicants." 38

3. The ECOA and Regulation B protect individuals such as Valerie Hawkins and Janice Patterson from financial ruin resulting from their spouses' failed business ventures. The Eighth Circuit's interpretation of "applicant" removes spousal guarantors from the ECOA's protection, permits destruction of disinterested spouses' creditworthiness, and promotes credit discrimination against married women..... 42

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4. Congress does not enact meaningless legislation prohibiting discrimination against persons which can never be enforced. An ECOA "applicant" includes corporate entities which have no race, gender, or marital status, making it impossible to discriminate against these corporate entities without considering those persons identified with and connected to the corporation. The Eighth Circuit's flawed ECOA interpretation concludes that lenders may lawfully deny credit based on the race, gender, marital status, age or religion of individuals owning small corporations without violating the ECOA, opening the floodgates to lender discrimination against closely-held business owners without consequence 45

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D. Where the "harm alleged has a sufficiently close connection to the conduct the statute prohibits," a plaintiff satisfies the proximate-cause requirement. The Wives' claimed credit reputation injury is sufficiently closely connected to CBR's marital status discrimination requiring the Wives to co-sign for their husbands' business debt. The Wives satisfy the proximate-cause requirement 47

E. Contracts prohibited by law are void and unenforceable, and the ECOA provides equitable and declaratory relief necessary to enforce the ECOA's prohibitions. The Wives alleged that CBR required them to incur personal liability in violation of federal law. The Wives can seek ECOA equitable and declaratory relief for CBR's federal law violations 49

II. Parties to an illegal contract possess standing to invalidate the contract as illegal and unenforceable regardless of statutory standing. No one disputes that the Wives' Complaint claims CBR required illegal contracts violating 12 C.F.R. § 202.7(d) and the ECOA. The Wives possess standing to invalidate illegal contracts regardless of any standing under 15 U.S.C. § 1691e 51

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B. The ECOA, under 12 C.F.R. § 202.7(d), prohibits requiring spousal guaranties. CBR hasn't challenged § 202.7(d)'s validity, and the Wives' Complaint claims CBR required the Wives' guaranties under the proscribed circumstances. The Wives' Complaint claims CBR violated the ECOA, and the Wives' guaranties are illegal..... 54

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III. When Congress delegates an agency authority to fill any explicit or implicit statutory "ambiguity" or "gap," courts grant deference to the agency's reasonable interpretation. Congress expressly delegated the FRB broad authority to prescribe regulations effectuating the ECOA's purposes. If Congress's definition of "applicant with respect to any aspect of a credit transaction" is ambiguous concerning primarily, absolutely, and unconditionally liable guarantors, the Court should defer to the FRB's reasonable interpretation 56

A. Congress intended that ECOA "applicants" include "debtors" contractually liable to pay the applied-for debt. The FRB's 1985 Regulation B clarifying amendment underscores Congress's intent that "debtor-applicants" possess ECOA standing. This Court should defer to the FRB's reasonable clarifying amendment..... 56

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B. Congress intended that an ECOA "applicant with respect to any aspect of a credit transaction" includes primary, absolute, and unconditional guarantors. But, if Congress didn't answer this precise question, then Congress expressly empowered the FRB to address any gap or ambiguity consistent with the ECOA's purpose. The FRB properly exercised its authority by including guarantors within the ECOA's definition of "applicant." 57

C. When Congress charges an agency to implement and enforce a statute, then deference is granted to the agency's statutory interpretation. Congress expressly delegated to the FRB broad authority to prescribe regulations to effectuate the ECOA's purposes. The Eighth Circuit failed to follow binding authorities by substituting its own construction of "applicant" for the decades-long reasonable interpretation made by the FRB 60

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D. An agency's interpretation that fulfills the statute's purpose is "within the bounds" of the agency's authority and reasonable. The FRB's ECOA interpretation and 1985 Regulation B clarifications that spousal guarantors are applicants fulfill the ECOA's purpose to eradicate marital discrimination in credit transactions. FRB's clarifying amendment is reasonable and entitled to deference 62

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OPINIONS BELOW

The Eighth Circuit Court of Appeals' opinion in *Hawkins, et al. v. Community Bank of Raymore* (Pet. App. 1) is reported at 761 F.3d 937. The District Court's opinion (Pet. App. 17) is unreported.

JURISDICTION

The court of appeals entered judgment on August 5, 2014. *See* J.A. 13. The Petitioners filed the Petition for Writ of Certiorari on November 4, 2014. This Court granted the Petition on March 2, 2015. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).[1]

STATUTES AND REGULATIONS INVOLVED

15 U.S.C. § 1691; 15 U.S.C. § 1691a; 15 U.S.C. § 1691b; 15 U.S.C. § 1691e; 12 C.F.R. § 202.2; and 12 C.F.R. § 202.7 are reproduced in Petitioners' Petition for Writ of Certiorari at Pet. App. 38-62.

STATEMENT OF THE CASE

Community Bank of Raymore ("CBR") made four loans totaling $2,077,900 to develop a residential

[1] All references to the United States Code are to the 2014 Code unless expressly otherwise noted.

subdivision owned by PHC Development, LLC ("PHC") in Peculiar, Missouri (the "Loan(s)"). Doc. 35 at 6-7 (*Defendant's Suggestions in Support of Its Motion for Summary Judgment* at 2-3). Gary Hawkins (individually) and Chris Patterson (as trustee for the Chris L. Patterson and Janice A. Patterson Living Trust Dated June 14, 2000) are PHC's member-owners. Doc. 70 at 7 (*Suggestions in Support of Defendant's Motion for Summary Judgment on Its Counterclaims for Breach of Guaranties & Plaintiffs' Affirmative Defenses* at 1).

Petitioners Valerie Hawkins and Janice Patterson (collectively, the "Wives" or "Petitioners") were not members, officers, or otherwise interested in PHC. Doc. 1 at 11 (*Complaint* at 11). The Wives didn't volunteer to guarantee the Loans' repayment. Doc. 1 at 11. CBR nevertheless required the Wives' primary, absolute, and unconditional responsibility to repay the applied-for Loans by signing CBR's loan papers (the "Guaranties"). Doc. 40 at 20 (*Community Bank of Raymore's First Amended Counterclaim* at 20).

CBR first loaned $249,900 on March 31, 2005, enabling PHC to buy the subdivision land. Doc. 35 at 6-7. Second, CBR loaned $1,170,000 on June 15, 2006, to build sewers, roads, etc. Doc. 35 at 7. On March 6, 2008 and October 20, 2006, CBR made the third and fourth Loans for $550,000 and $108,000, respectively. Doc. 35 at 7.

When CBR approved the applied-for Loans, CBR's internal loan memos analyzed PHC's financial

strength, identified the Wives as guarantors under CBR industry-standard loan papers, and reviewed loan collateral. *See, e.g.*, Doc. 79-7 at 1-3 (Exhibit 72 to *Plaintiffs' Suggestions in Opposition to Defendant's Motion for Summary Judgment on Its Counterclaims for Breach of Guaranties & Plaintiffs' Affirmative Defenses* at 1-3). CBR's internal loan memos noted the Wives needed to sign under industry-standard guaranty documents having primary, absolute, and unconditional responsibility to repay the applied-for Loans. Doc. 79-7 at 1. The Wives comprised part of the loan review and approval process. Doc. 79-7 at 1-3.

CBR used industry-standard, form loan papers purchased from leading loan document software companies including Bankers Systems, Inc. and Harland Financial Solutions, Inc. (LaserPro Lending). Doc. 40-1 at 1 – Doc. 40-2 at 99 (Exhibits A-ZZ to *Community Bank of Raymore's First Amended Counterclaim*). Under those industry-standard loan papers, CBR claims the Wives must repay the applied-for Loans even if CBR elects not to pursue PHC, the collateral, Gary Hawkins, Chris Patterson, or anyone else obligated to pay. Doc. 70 at 43.

The Wives' industry-standard, "all encompassing" Guaranties make the Wives "primarily" liable:

> Lender can enforce this Guaranty against Guarantor even when Lender has not exhausted Lender's remedies against anyone else obligated to pay the Indebtedness or against any collateral securing the Indebtedness,

> this Guaranty or any other guaranty of the Indebtedness.

The Wives' industry-standard Guaranties further state:

> Guarantor's Share of the Indebtedness will only be reduced by sums actually paid by Guarantor under this Guaranty, but will not be reduced by sums from any other source including, but not limited to, sums realized from any collateral securing the Indebtedness or this Guaranty, or payments by anyone other than Guarantor.

See, e.g., Doc. 79-7 at 83. CBR confirmed its belief that the Wives' primary liability was "absolute and unconditional" to repay the Loans by later suing the Wives to do just that – collect the Loans from the Wives before collecting from Gary Hawkins, Chris Patterson, PHC, or the collateral. Doc. 70 at 18, 43.

After CBR closed the first Loan on March 31, 2005 to buy the subdivision land, CBR extended, renewed, and continued that Loan twice – May 1, 2010 and November 1, 2010. Doc. 35 at 7. After CBR made the second Loan to build sewers and streets on June 15, 2006, CBR extended, renewed, and continued the second Loan four separate times – June 15, 2007; June 15, 2008; October 15, 2008; and June 15, 2009. Doc. 35 at 7-8.

Similarly, after CBR made the third Loan on March 6, 2008, CBR extended, renewed, and continued the third Loan twice – March 15, 2010 and November

1, 2010. Doc. 35 at 8. After CBR made the fourth Loan on October 20, 2006, CBR extended, renewed, and continued the fourth Loan four separate times – June 15, 2007; June 15, 2008; October 15, 2008; and June 15, 2009. Doc. 35 at 8.

When each Loan matured, CBR claims the Wives' industry-standard, "all encompassing" Guaranties made them primarily, absolutely, and unconditionally liable to repay the Loans. Doc. 70 at 18, 43. Simply put, when each Loan matured, CBR claims the Wives independently agreed to repay the Loans unless CBR extended, renewed, or continued the Loans. Doc. 70 at 27-28, 43. For instance, on May 1, 2010, when the first Loan matured, CBR claims the Wives were required to repay the $249,900 even if CBR elected not to pursue PHC, the collateral, Gary Hawkins, Chris Patterson, or anyone else obligated to pay. *Id.*

That is, CBR claims the Wives independently owed the $249,900. *Id.* Accordingly, the Wives needed CBR to defer payment of the first Loan debt by extending, renewing, or continuing the credit or face suit to collect the full amount. *Id.* The other three Loans were the same. When each Loan matured, the Wives needed CBR to extend, renew, or continue the credit or face suits to collect the full amounts.

Just like the initial memos approving all four of the applied-for Loans, when CBR extended, renewed, or continued each Loan at each maturity, CBR analyzed the same information. *See, e.g.*, Doc. 79-6 at 22-24, 78-81; Doc. 79-13 at 52-54. That is, CBR analyzed

PHC's financial strength; identified the Wives as guarantors under CBR's industry-standard loan papers making the Wives primarily, absolutely, and unconditionally liable; and identified collateral for the Loans. *Id.* CBR's internal loan memos show the Wives were part of the loan review and approval process for each extension, renewal, or continuation of the credit. *Id.*

PHC's, Gary Hawkins's, and Chris Patterson's relationship with CBR soured in 2010 over allegations of CBR's fraud. Doc. 79 at 78-86. Specifically, Gary Hawkins and Chris Patterson claimed CBR fraudulently procured a security interest in collateral never agreed to by PHC, Gary Hawkins, Chris Patterson, or the Wives. *Id.*

A later dispute rooted in the same claims of CBR's earlier fraud surfaced in 2012 over how to restructure the Loans. Doc. 79 at 78-87. PHC, Gary Hawkins, Chris Patterson, and CBR reached an impasse. In short, it became bitter, and CBR demanded payment or warned it intended to sue including claims against the Wives. Doc. 35-5 at 36-37, 41-42.

The Wives preemptively filed their Federal Court suit, asserting jurisdiction under 28 U.S.C. § 1331. Doc. 1 at 1-13. The Wives claimed marital status discrimination by CBR requiring the Wives to sign form loan papers violating the ECOA. Doc. 1 at 12.

The Wives' claims were rooted in Regulation B which originated in 1975 by the Federal Reserve Board's ("FRB") prohibition against creditors requiring

spousal signatures. *See* 12 C.F.R. § 202.7 (1975); Doc. 1 at 12. Under Regulation B, creditors may request additional signatures for the debt, but may not require that it be the spouse. 12 C.F.R. § 202.7(d)(5). CBR hasn't challenged this Regulation B prohibition.

The Wives claim CBR's ECOA violations caused them actual damages, including monetary losses, attorneys' fees, injury to credit reputation, mental anguish, humiliation, and embarrassment. Doc. 1 at 12-13. The Wives further requested "an order declaring as void the purported Guaranties and declaring that Valerie J. Hawkins and Janice A. Patterson are not liable on the purported Guaranties pursuant to 15 U.S.C. § 1691e(c) and 12 C.F.R. § 202.17(b)." Doc. 1 at 12-13.[2]

CBR invoked 28 U.S.C. § 1367(a) supplemental jurisdiction, claiming in its Amended Counterclaim it can collect the Loans from the Wives. Doc. 40 at 19-23. CBR moved for summary judgment claiming the Wives lacked standing under the ECOA, and requesting that the Wives be held primarily, absolutely, and unconditionally liable for the Loans before CBR obtained a judgment against PHC, Gary Hawkins, or Chris Patterson. Doc. 35 at 13-20; Doc. 70 at 24-27.

The District Court ruled that the Wives weren't ECOA "applicants," and therefore lacked standing to

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[2] 12 C.F.R. § 202.17(b) was re-designated as 12 C.F.R. § 202.16(b). *See* Equal Credit Opportunity, 72 Fed. Reg. 63,451 (Nov. 9, 2007).

assert ECOA claims or affirmative defenses (the "ECOA Order"). Pet. App. 17-24. The District Court then discontinued exercising supplemental jurisdiction and dismissed CBR's Counterclaims without prejudice on August 30, 2013. Pet. App. 25-34. The District Court entered Judgment on September 6, 2013, and an Amended Judgment on September 10, 2013. Pet. App. 35-36. The Wives timely filed their notice of appeal on September 13, 2013. Doc. 106 at 1-2 (*Notice of Appeal* at 1-2). The parties argued the case April 17, 2014. The Eighth Circuit issued its Opinion on August 5, 2014, affirming the District Court's no-standing ruling. Pet. App. 1-16.

Here, the Wives challenge the Eighth Circuit's ECOA no-standing conclusions. *See* Pet. App. 1-16. The Eighth Circuit decided the ECOA's definition of "applicant" unambiguously excludes the Wives as primarily, absolutely, and unconditionally liable spousal guarantors because they were not deemed an integral part of "any aspect of a credit transaction." *See* Pet. App. 6-10. The Eighth Circuit refused to defer to the FRB interpretation of "applicant" under 15 U.S.C. § 1691a(b). Pet. App. 9.

The Eighth Circuit's decision directly conflicts with the Sixth Circuit's decision that "applicant" includes spousal guarantors. *See RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC*, 754 F.3d 380, 384-86 (6th Cir. 2014). The Eighth Circuit's ruling also conflicts with state courts of last resort in Alaska (*Still v. Cunningham*, 94 P.3d 1104 (Alaska 2004)); Iowa (*Bank of the West v. Kline*, 782 N.W.2d

453 (Iowa 2010)); Missouri (*Boone Nat'l Sav. & Loan Ass'n v. Crouch*, 47 S.W.3d 371 (Mo. 2001)); and Virginia (*Eure v. Jefferson Nat'l Bank*, 448 S.E.2d 417 (Va. 1994)).

SUMMARY OF THE ARGUMENT

In a dizzying effort to substantiate dismissing the Wives' claims, the Eighth Circuit stated that "[i]f [the Wives] do not qualify as applicants, then [CBR] did not violate the ECOA by requiring them to execute the guaranties." Pet. App. 5. Stated differently, even though the ECOA and Regulation B prohibit requiring spouses to co-sign or guaranty debts, lenders aren't liable because the persons required to sign can't sue.

In short, the ECOA and Regulation B spousal signature prohibition, which has remained unchallenged for over forty (40) years, is now a nullity. *Hawkins* grants lenders an untethered license to require spousal signatures with impunity.

The Eighth Circuit's oversimplified conclusions exact a disservice on the black letter principle that illegal contracts are unenforceable. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 78 (1982); *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 33 (3d Cir. 1995); *United States v. Meadors*, 753 F.2d 590, 593 (7th Cir. 1985); *Kline*, 782 N.W.2d at 461; *Eure*, 448 S.E.2d at 419; *Boone*, 47 S.W.3d at 375;

King v. Moorehead, 495 S.W.2d 65, 77 (Mo. Ct. App. 1973).

For instance, under the Eighth Circuit's conclusions, persons being sued in federal court to enforce illegal guaranties violating the ECOA can't defend the illegal guaranties' enforcement. That is, according to the Eighth Circuit, "a guarantor is not protected from marital-status discrimination by the ECOA" even though the contract violates the signature prohibitions. Pet. App. 9.

Simply put, the federal courts will be required to lend themselves to the enforcement of illegal contracts directly contradicting this Court's prior rulings. *See Kaiser*, 455 U.S. at 78.

Contrary to these erroneous conclusions, standing to sue must be used to enforce limits on discrimination; blindly accepting discrimination must not be used to eliminate standing to sue.

Moreover, the Eighth Circuit asserts that the ECOA only protects individuals who have "participated in the loan-application process." Pet. App. 10. But the Eighth Circuit didn't elaborate on the extent to which individuals must "participate" to qualify as applicants, except to state that guarantors don't "participate" by virtue of signing their guaranties. Pet. App. 4-11. The Eighth Circuit determined that the Wives, based purely on their status as guarantors, couldn't be considered applicants. *Id.* The Eighth Circuit's lack of analysis is telling because it limits

protection only to the borrowing entity who applied for the loan.

For example, under the Eighth Circuit's impermissibly narrow reading of "applicant," if the Wives formally had co-signed promissory notes with PHC, the Wives are "applicants." However, simply because the Wives signed as primarily, absolutely, and unconditionally liable guarantors (in substance co-signing the Loans under Missouri law), the Wives aren't entitled to ECOA protection. The Eighth Circuit's narrow reading is circuitous and elevates form over substance.

What does the Eighth Circuit's vague notion of "participating in the loan application process" really mean? Is only the borrowing entity participating in "any aspect of a credit transaction"? Is a lender-required spousal guarantor not participating? Did PHC's owners, Chris Patterson and Gary Hawkins, also guarantors, participate in the "loan application process"? If so, how was their participation different than the Wives'? These questions indict the Eighth Circuit's ruling.

Under the Eighth Circuit's narrow reading, if two minority women form a corporation to operate their business, and they are denied credit, they have no standing because the corporation is technically the "borrower" and the only "applicant." The corporation has no race, gender, marital status, etc. against which to discriminate.

We are thus given a choice between standing for minority and women corporation owners, and a brazen license to discriminate. If the Court chooses no-standing, then we most certainly will have brazen discrimination.

CBR also trumpets an impermissibly "grudging, narrow" ECOA interpretation adopted by *Hawkins* that can't withstand even minimal reflection under the ECOA's data collection requirements. 15 U.S.C. § 1691c-2. The ECOA requires lenders to gather "small business loan" information relating to "women-owned" and "minority-owned" businesses. § 1691c-2(a)-(b).

The ECOA expressly prohibits bank "underwriters or other officer[s] or employee[s]" who determine approvals "concerning an application for credit" any access to information on the women or minority owners. § 1691c-2(d)(1). In fact, if those bank decision makers learn of such information, the bank must provide notice to the "applicant" that such decision makers learned of the women-owned, minority-owned information and that the bank "may not discriminate on the basis of such information." § 1691c-2(d)(2).

As if this doesn't seem to slam the door on CBR's "grudging, narrow" ECOA interpretation, further provisions sound the door closing even more loudly. The required information gathering includes "the principal place of business of the women-owned [or] minority-owned" business and "the race, sex, and

ethnicity of the principal owners of the business." § 1691c-2(e)(2)(E), (G).

Surely looking behind the veil of a small business corporation at who the owners are to establish ECOA discrimination was fully envisioned by Congress. Otherwise, a "grudging, narrow" ECOA reading would provide lenders unbridled license to discriminate against small corporations claiming they have no race, gender, marital status, etc.

Also, since its 1975 enactment, Regulation B has prohibited creditors from requiring spousal signatures to co-sign or guaranty debts. *See* 12 C.F.R. § 202.7 (1975). The current Regulation B continues this prohibition. 12 C.F.R. § 202.7(d)(1). While a creditor may request additional signatories for the debt, it can't require a spouse. 12 C.F.R. § 202.7(d)(5).

Congress expressly delegated authority to the FRB to "prescribe regulations" that "in the judgment of the [FRB] are necessary or proper to effectuate the purposes" of the ECOA, "to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith." 15 U.S.C. § 1691b(a). It is well-settled that the agency's interpretation of the statute it is charged to administer is entitled to great deference.

In Regulation B's forty (40) years, Congress hasn't amended this spousal guaranty prohibition. In fact, Congress amended the ECOA in 2010, reaffirming that FRB regulations carry the force of law. 15 U.S.C. § 1691a(g) ("Any reference to any requirement

imposed under this subchapter or any provision thereof includes reference to the regulations of the Bureau under this subchapter or the provision thereof in question.").

This Court has concluded "congressional failure to revise or repeal the agency's [statutory] interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 983 (1986) (quoting *N.L.R.B. v. Bell Aerospace, Co.*, 416 U.S. 267, 275 (1974)).

Here, CBR hasn't challenged the FRB's § 202.7(d) prohibition against requiring spouses to co-sign or guaranty debts. The Eighth Circuit did not consider the FRB's authority under § 202.7(d) either. Pet. App. 1-11. Other courts have universally acknowledged this valid spousal signature prohibition. *RL BB Acquisition*, 754 F.3d at 383; *Silverman*, 51 F.3d at 33; *Kline*, 782 N.W.2d at 458-62; *Boone*, 47 S.W.3d at 373-75.

The Wives' Complaint claims CBR required the Wives co-sign and/or guaranty their husbands' business debts violating ECOA prohibitions. The Wives' claims fall squarely within the ECOA protections. No one has ever disputed this.

Yet, the Eighth Circuit brazenly held that this obvious claimed ECOA violation is of no consequence. The Wives are powerless to sue or defend without standing. The lender's discrimination goes unchecked. How this does not stand for "circumvention or evasion" of the ECOA, one can only wonder.

Finally, Congress obviously intended that primarily, absolutely, and unconditionally liable guarantors fall within the ECOA's definition of "applicant with respect to any aspect of a credit transaction." The "zone of interests" protected by the ECOA obviously encompass this.

If, however, Congress didn't answer precisely that an "applicant with respect to any aspect of a credit transaction" includes primarily, absolutely, and unconditionally liable guarantors, then the FRB filled the gap through its clarifying amendment. Official Staff Interpretations, 12 C.F.R., Part 202, Supp. I (Aug. 15, 2011) (analyzing subsection 7(d)(5) and stating "a guarantee on an extension of credit is part of a credit transaction and therefore subject to the regulation").

The Eighth Circuit erroneously concluded that "applicant" doesn't include primarily, absolutely, and unconditionally liable guarantors when a loan transaction is extended, renewed, or is continued. The FRB obviously disagrees. Rather than give *Chevron* deference to the FRB's congressionally-delegated interpretation of "applicant" for "any aspect of a credit transaction," the Eighth Circuit, utilizing the fiction that the Wives' liability was "secondary" to that of PHC, imposed its "own construction on the [ECOA]." *Young*, 476 U.S. at 980 (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). This Court should instead defer to the FRB's reasonable interpretation.

ARGUMENT

I. Parties possess statutory standing where their claims fall within a statute's "zone of interests" protected, and the damages claimed are proximately caused by the statutory violations. The ECOA's zone of interests protects the Wives against marital status discrimination in requiring the Wives co-sign and/or guaranty their husbands' business debts, and CBR's ECOA violations proximately caused the Wives' damages. The Wives possess ECOA statutory standing to sue.

Statutory standing requires claims falling within the statute's "zone of interests" and damages proximately caused by the statute's violations. *See Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388-90 (2014). Here, the Wives fall within the ECOA's zone of interests protected and were directly damaged by CBR's ECOA violation. The Wives possess ECOA standing.

A. The ECOA prohibits requiring spouses to co-sign or guaranty debts. The Wives' Complaint claims CBR required the Wives co-sign and/or guaranty their husbands' business debt. The Wives' claims fall squarely within the ECOA protections.

Since its 1975 enactment, Regulation B has prohibited creditors from requiring spousal signatures to

co-sign or guaranty debts. *See* 12 C.F.R. § 202.7 (1975). The current Regulation B continues this prohibition. 12 C.F.R. § 202.7(d)(1). While a creditor may request additional signatories for the debt, it can't require a spouse. 12 C.F.R. § 202.7(d)(5).

Using broad statutory authority under the ECOA (*see* 15 U.S.C. § 1691b(a)), the FRB's Regulation B states, in part, that "[a] creditor shall not require the signature of an applicant's spouse or other person on a credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested." 12 C.F.R. § 202.7(d)(1). Regulation B further states that if an additional party is necessary to support the credit requested, "[t]he applicant's spouse may serve as an additional party, but the creditor shall not require that the spouse be the additional party." 12 C.F.R. § 202.7(d)(5).

Congress expressly delegated authority to the FRB to "prescribe regulations" that "in the judgment of the [FRB] are necessary or proper to effectuate the purposes" of the ECOA, "to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith." 15 U.S.C. § 1691b(a). It is well-settled that the agency's interpretation of the statute it is charged to administer is entitled to great deference:

> This view of the agency charged with administering the statute is entitled to considerable deference; and to sustain it, we need not

> find that it is the only permissible construction that [the agency] might have adopted but only that [the agency's] understanding of this very "complex statute" is a sufficiently rational one to preclude a court from substituting its judgment for that of [the agency].

Young, 476 U.S. at 981 (alterations in original).

Chevron deference is appropriate "when it appears that Congress delegated authority to the agency to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Beeler v. Astrue*, 651 F.3d 954, 959 (8th Cir. 2011) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)).

In Regulation B's forty (40) years, Congress hasn't amended this spousal guaranty prohibition. In fact, Congress amended the ECOA in 2010, reaffirming that FRB regulations carry the force of law. 15 U.S.C. § 1691a(g) ("Any reference to any requirement imposed under this subchapter or any provision thereof includes reference to the regulations of the Bureau under this subchapter or the provision thereof in question.").

This Court has concluded "congressional failure to revise or repeal the agency's [statutory] interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Young*, 476 U.S. at 983 (quoting *N.L.R.B.*, 416 U.S. at 275).

Here, CBR hasn't challenged the FRB's § 202.7(d) prohibition against requiring spouses to co-sign or guaranty debts. The Eighth Circuit did not consider the FRB's authority under § 202.7(d) either. Pet. App. 1-11. Other courts have universally acknowledged this valid spousal signature prohibition. *RL BB Acquisition*, 754 F.3d at 383; *Silverman*, 51 F.3d at 33; *Kline*, 782 N.W.2d at 458-62; *Boone*, 47 S.W.3d at 373-75.

The Wives' Complaint claims CBR required the Wives co-sign and/or guaranty their husbands' business debts violating ECOA prohibitions. The Wives' claims fall squarely within the ECOA protections. No one has ever disputed this.

B. Statutory standing requires falling within the "zone of interests" protected by the statute. The ECOA's broad purposes include eliminating marital status discrimination in credit transactions. The Wives' marital status discrimination claims fall within the ECOA's protected zone of interests.

Statutory standing requires "fall[ing] within the zone of interests protected by the law invoked." *Lexmark*, 134 S. Ct. at 1388 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)); *see also Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 97 (1998). Traditional statutory construction tools must show a "legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark* 134 S. Ct. at 1387.

Congress presumably legislates against this "zone-of-interests" test, which applies unless expressly negated. *See Bennett v. Spear*, 520 U.S. 154, 163 (1997). Courts may not limit statutory claims merely because "prudence" dictates. *Lexmark*, 134 S. Ct. at 1388. Rather, "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Id.* at 1386 (quoting *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013)) (internal quotation marks omitted).

1. Expressed legislative purposes clarify the statute's zone of protected interests. The ECOA's expressed purpose requires making credit available without marital status discrimination, including requiring spouses to co-sign and/or guaranty loans.

A statute's zone of protected interests is largely defined by the statute's purpose statement. In *Lexmark*, for example, the Court identified the statutory interests protected by examining the Lanham Act's "unusual, and extraordinarily helpful" purpose statement. 134 S. Ct. at 1389 (quoting *H.B. Halicki Prods. v. United Artists Commc'ns, Inc.*, 812 F.2d 1213, 1214 (9th Cir. 1987)). The Lanham Act's purpose statement identified "protect[ing] persons engaged in [commerce within the control of Congress] against unfair competition." *Id.* (quoting 15 U.S.C. § 1127). Plaintiffs alleging injury to a commercial interest in reputation or sales thus "come within the

zone of interests in a suit for false advertising under § 1125(a)." *Id.* at 1390.

Here, Congress's ECOA purpose to eradicate credit discrimination is broad and remedial:

> **Findings and purpose**: The Congress finds that there is a need to insure that the various financial institutions and other firms engaged in the extensions of credit exercise their responsibility ***to make credit available with fairness, impartiality, and without discrimination on the basis of sex or marital status***. Economic stabilization would be enhanced and competition among the various financial institutions and other firms engaged in the extension of credit would be strengthened by an absence of discrimination on the basis of sex or marital status, as well as by the informed use of credit which Congress has heretofore sought to promote. It is the purpose of this Act to require that financial institutions and other firms engaged in the extension of credit make that credit equally available to all credit-worthy customers without regard to sex or marital status.

Equal Credit Opportunity Act, Pub. L. No. 93-495, § 502, 88 Stat. 1500 (1974) (emphasis added).[3] Obviously, Congress intended to eliminate credit discrimination based on sex or marital status. *See* S. Rep. No.

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[3] Pub. L. No. 93-495, § 502 appears as a statutory note to 15 U.S.C. § 1691.

94-589, at 3 (1976) (sex and marital status "are, and must be, irrelevant to a credit judgment").

That is, requiring spouses to be primarily, absolutely, and unconditionally liable for debts falls within the ECOA's broad, remedial purposes. Congress intended to restrict creditors from requiring spousal liability for debts based solely on marital status.

Excluding primarily, absolutely, and unconditionally liable spouses from ECOA protections contradicts the ECOA's purpose to eliminate marital status credit discrimination. There is "no reason to artificially limit the possible meanings of 'applicant'" considering the ECOA broadly prohibits discrimination "with respect to *any aspect* of a credit transaction" and has "broad remedial goals." *RL BB Acquisition*, 754 F.3d at 385 (emphasis in original); *see also Silverman*, 51 F.3d at 33 ("[T]o affirmatively benefit by disregarding the requirements of the ECOA would seriously undermine the Congressional intent to eradicate gender and marital status based credit discrimination." (quoting *Integra Bank v. Freeman*, 839 F. Supp. 326, 329 (E.D. Pa. 1993))); *Shaumyan v. Sidetex Co.*, 900 F.2d 16, 18 (1st Cir. 1990) (ECOA is "remedial in nature"); *Empire Bank v. Dumond*, No. 13-CV-0388, 2013 WL 6238605, at *6 (N.D. Okla. Dec. 3, 2013) (defining guarantors as "applicants" "best effectuate[s] the ECOA's goal of preventing discrimination based upon marital status").

"Since discrimination is inherently insidious, almost presumptively intentional, yet often difficult

to detect and ferret out," Congress expressed that "strong enforcement of [the ECOA] is essential to accomplish its purposes." S. Rep. No. 94-589, at 415 (1976). This Court has previously construed similar statutory provisions broadly to encourage effective enforcement. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1334 (2011). While Congress empowered various federal agencies to enforce ECOA protections, Congress intended that the "chief enforcement tool will continue to be private actions for actual and punitive damages." S. Rep. No. 94-589, at 415 (1976); *see also United States v. Beneficial Corp.*, 492 F. Supp. 682, 685 (D.N.J. 1980), *aff'd*, 673 F.3d 1302 (3d Cir. 1981).

The Wives' Complaint claims that CBR required the Wives' primary, absolute, and unconditional liability to repay the Loans because they are married to PHC's owners. CBR's requirement hinged solely on marital status. The ECOA prohibits this precise credit discrimination.

Construing the ECOA's remedial purposes leads to the inescapable conclusion: the Wives' ECOA claims fall within the statute's zone of protected interests.

2. Traditional statutory construction rules show that ECOA "applicants" include "debtors" contractually liable to pay the applied-for credit. CBR claims the Wives are "debtors" with contractual obligations to pay the applied-for debts. The Wives are "debtor-applicants" possessing ECOA standing.

Courts must "give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question." *See Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 298 (2010) (quoting *United States v. Bernstein*, 423 U.S. 303, 310 (1976)); *see also Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979) ("As in all cases of statutory interpretation, [the Court's] task is to interpret the words of th[e] statut[e] in light of the purposes Congress sought to serve.").

The statutory construction should be consistent with, and not undermine the statute's basic objective. *See Kasten*, 131 S. Ct. at 1333; *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). A broad, remedial statutory purpose cautions against "narrow, grudging" statutory interpretations. *See Kasten*, 131 S. Ct. at 1334 (quoting *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944)).

a. A governing text's words are of paramount concern, and what they convey in their context is what they mean. The ECOA's text shows that primarily, absolutely, and unconditionally liable guarantors contractually obligated to repay the applied-for debt are "applicants" who apply for "credit." The Wives are therefore "debtor-applicants" possessing ECOA standing.

Statutory construction begins with the statute's text, realizing that "[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *Sebelius v. Cloer*, 133 S. Ct. 1886, 1893 (2013) (quoting *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006)). The Court must "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson,* 519 U.S. at 340. The inquiry ceases "if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Id.* at 340 (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989)); *see also Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002).

Here, the ECOA defines "applicant" to include "any person" who directly applies for "credit." *See* 15 U.S.C. § 1691a(b). The ECOA then defines "credit" as "the right granted by a creditor *to a debtor* to defer payment of debt or incur debts and defer its

payment." *See* 15 U.S.C. § 1691a(c) (emphasis added). That is, a "debtor" who contractually agrees with a creditor to repay the applied-for debts is an ECOA credit "applicant."

The ECOA doesn't define "debtor." In lieu of express statutory definition, Black's Law Dictionary defines a "debtor" as "[s]omeone who owes an obligation to another, esp. an obligation to pay money." BLACK'S LAW DICTIONARY (10th ed. 2014).

Under CBR's loan papers, Missouri law governs. *See, e.g.*, Doc. 40-1 at 24 (Exhibit D to *Community Bank of Raymore's First Amended Counterclaim* at 2). Missouri law considers guarantors who "owe[ ] payment or other performance of [an] obligation" a "debtor." *Clune Equip. Leasing Corp. v. Spangler*, 615 S.W.2d 106, 108 (Mo. Ct. App. 1981) (quoting Mo. Rev. Stat. § 400.9-105(1)(d)) ("[T]he definition of debtor appears broad enough to include guarantors. "); *see also Cherry Manor, Inc. v. Am. Health Care, Inc.*, 797 S.W.2d 817, 821 (Mo. Ct. App. 1990). The "overwhelming majority of courts" hold that a "guarantor is a debtor" within the meaning of Article 9 of the Uniform Commercial Code. *United States v. Kelley*, 890 F.2d 220, 223 (10th Cir. 1989) (quoting *In re Kirkland*, 91 B.R. 551, 553 (Bankr. 9th Cir. 1988) and citing additional authority from Alabama, California, Hawaii, Iowa, Massachusetts, Minnesota, Missouri, New York, North Dakota, Pennsylvania, and Vermont).

Here, the ECOA's plain and ordinary use of the word "debtor" to define persons who are "applicants"

shows the Wives, as "debtors," fall within the broad scope of persons who are "applicants." CBR claims the Wives are primarily, absolutely, and unconditionally liable to repay the applied-for Loans. The Wives meet the plain definition of "debtor." "Debtors" are "applicants" when they contractually agree to repay the lender the applied-for credit.

When each Loan matured, CBR claims the Wives' industry-standard "all encompassing" Guaranties made them primarily, absolutely, and unconditionally liable to repay the Loans. Doc. 70 at 18, 43. Simply put, when each Loan matured, CBR claims the Wives independently agreed to repay the Loans unless CBR extended, renewed, or continued the Loans. Doc. 70 at 27-28, 43. For instance, on May 1, 2010, when the first loan matured, CBR claims the Wives were required to repay the $249,900 even if CBR elected not to pursue PHC, the collateral, Gary Hawkins, Chris Patterson, or anyone else obligated to pay. *Id.* CBR claims the Wives were primarily, absolutely, and unconditionally liable as if they had co-signed PHC's notes themselves.

Accordingly, the Wives needed CBR to defer payment of the first Loan debt by extending, renewing, or continuing the credit or face suit to collect the full amount. *Id.* All four Loans were structured identically. When each Loan matured, the Wives needed CBR's extension, renewal, or continuation of the credit to avoid CBR's claims of immediate primary, absolute, and unconditional liability for the maturing Loan. *Id.*

The Wives are "debtor-applicants" who applied directly to CBR for credit under 15 U.S.C. § 1691a(b).

b. Statutory text must be construed as a whole considering the statute's purpose and context. Construing the ECOA's text as a whole shows persons primarily, absolutely, and unconditionally liable to repay the applied-for debts are "applicants."

Statutory language can't be considered in a vacuum, but must be considered in context in view of the overall statutory scheme. *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). The meaning of an unclear word or phrase may be determined by immediately surrounding words. *See James v. United States*, 550 U.S. 192, 222 (2007) ("[W]hich of various possible meanings a word should be given must be determined in a manner that makes it 'fit' with the words with which it is closely associated.").

A statutory interpretation requires considering the entire text, and considering the purpose and context of the statute. *See Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006); *see also Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968, 1999 (2011); *Kasten*, 131 S. Ct. at 1330-31. Statutory construction "must, to the extent possible, ensure that the statutory scheme is coherent and consistent." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 222 (2008).

i. "Applicant" must be viewed in context which shows it includes those persons contractually liable to pay including small business owners who co-sign debts. Small business corporation "applicants" have no race, gender, or marital status providing no discriminatory basis upon which they can be denied credit. "Applicant" means persons in addition to the named borrowing entity agreeing to repay the applied-for debt.

Here, "applicant" must be viewed in context. The statute protects applicants against "creditor" discrimination "with respect to any aspect of a credit transaction." 15 U.S.C. § 1691(a). This "any aspect of a credit transaction" phrase broadens the persons who are "applicants."

For instance, a corporate entity has no race, gender, marital status, age, or religion. Under the concurring *Hawkins* opinion, lenders can deny credit to women-owned or minority-owned small corporations based on gender or race, but the woman or minority owner directly impacted possesses no ECOA standing. Only the borrower-corporation, as "applicant" possesses ECOA standing.

This "narrow, grudging" ECOA reading enables lenders to discriminate against owners based on race,

gender, marital status, age, or religion without ECOA violation. Following the *Hawkins* concurrence leaves small corporation owners subject to the obvious discriminatory pretext that the corporation has no race or gender, and thus can't be discriminated against.

The ECOA expressly recognizes that a "person" under the definition of "applicant" includes "a corporation trust, estate, partnership, cooperative, or association." 15 U.S.C. § 1691a(f). Who constitutes such a "cooperative" or an "association"?

If condominium owners who are primarily minorities form a non-profit corporation to manage the "association" which is denied credit, is the race-less, non-profit corporation the "putative debtor" and only party with standing? When the race-less, non-profit association brings a claim for ECOA race discrimination, won't they face the specious arguments under the "putative debtor" pretext that a corporation has no race, and therefore can't assert a claim? Aren't the actual condominium owners who comprise the non-profit corporation the real parties who have suffered discrimination?

In the same way, persons primarily, absolutely, and unconditionally liable to repay the applied-for debts comprise persons who are part of "any aspect of a credit transaction."

The ECOA doesn't say that "any person" includes only the person "who requests credit to benefit herself." The ECOA doesn't say "any person" includes

only the "borrowing entity." The ECOA doesn't say a guarantor, mortgagor, pledger, surety, or accommodation party isn't a "person" who "applies directly" for an extension or renewal of credit.

What CBR wants the ECOA to say, it just simply doesn't say.

ii. ECOA data collection requirements show that "applicants" include persons identified with or connected to the credit transaction. Persons owning small businesses and persons agreeing to repay the applied-for debts are identified with and connected to the credit transaction.

CBR's trumpeted and impermissibly "grudging, narrow" ECOA interpretation adopted by *Hawkins* can't withstand even minimal reflection under the ECOA's data collection requirements. *See* 15 U.S.C. § 1691c-2. The ECOA requires lenders to gather "small business loan" information relating to "women-owned" and "minority-owned" businesses. § 1691c-2(a)-(b). This required data collection is triggered "in the case of any application to a financial institution for credit for women-owned, [and] minority-owned" businesses. § 1691c-2(b).

The ECOA expressly prohibits bank "underwriters or other officer[s] or employee[s]" who determine

approvals "concerning an application for credit" any access to information on the women owners or minority owners. § 1691c-2(d)(1). In fact, if those bank decision makers on "applications for credit" learn of such information, the bank must provide notice to the "applicant" that such decision makers learned of the women-owned, minority-owned information and that the bank "may not discriminate on the basis of such information." § 1691c-2(d)(2).

As if this doesn't seem to slam the door on CBR's "grudging, narrow" ECOA interpretation, further provisions sound the door closing even more loudly. The required information gathering includes "the principal place of business of the women-owned [or] minority-owned" business and "the race, sex, and ethnicity of the principal owners of the business." § 1691c-2(e)(2)(E), (G). Minority-owned and women-owned businesses are defined as those with "more than 50 percent of the ownership or control of which is held by 1 or more" minority individuals or women. § 1691c-2(h)(5)-(6).

Surely looking behind the veil of a small business corporation at who the owners are to establish ECOA discrimination was fully envisioned by Congress. Otherwise, a "grudging, narrow" ECOA reading would provide lenders unbridled license to discriminate against small corporations claiming they have no race, gender, marital status, etc.

c. Statutory interpretations that validate outweigh interpretations that invalidate because legislatures don't enact meaningless laws.

A presumption exists that legislatures don't enact useless or meaningless legislation. *Corley v. United States*, 556 U.S. 303, 314 (2009) ("The Government's reading is thus at odds with one of the most basic interpretive canons, that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (internal quotation marks omitted))).

If the entity-borrower is the sole ECOA "applicant" as suggested in the *Hawkins* concurrence and trumpeted by CBR, then the ECOA's protections are meaningless. The entity-borrower has no race, gender, age, or ethnicity and can't be discriminated against. Limiting the ECOA's protections to only the entity-borrower renders the ECOA toothless to enforce discrimination claims for small businesses.

d. The Wives "applied" under the ECOA to CBR for extensions, renewals, and continuations of credit as co-signors and/or guarantors primarily, absolutely, and unconditionally liable to repay the applied-for Loans. The Wives were "applicants" for renewal falling within the ECOA's "zone of interests."

Primary, absolute, and unconditional guarantors are liable under Missouri law as if they co-signed the note because the guaranty contract defines the guarantor's obligation. *See Jamieson-Chippewa Inv. Co. v. McClintock*, 996 S.W.2d 84, 87-88 (Mo. Ct. App. 1999). If a guarantor assumes primary liability, the creditor need not pursue other avenues of repayment. *Mercantile Bank, N.A. v. Loy*, 77 S.W.3d 93, 98 (Mo. Ct. App. 2002). A party that "guarantees payment" rather than collection and assumes primary and unconditional liability is no different than a party co-signing the note.

Here, CBR required the Wives to sign industry-standard guaranty contracts. Under these industry-standard contracts, the Wives are liable regardless of whether CBR pursues remedies against PHC, property securing the Loans, or anyone else. CBR claims the Wives were primarily, absolutely, and unconditionally liable as if they had co-signed PHC's notes themselves. Doc. 70 at 27-28, 43.

The Eighth Circuit ignored this reality when characterizing the Wives' obligations as "collateral" and "secondary." Pet. App. 6. The Wives *were* exposed to the same legal consequences as PHC and the husbands. The Wives were thus "applicants with respect to any aspect of a credit transaction" and "appli[ed] to [CBR] directly" for renewal of the Loans. 15 U.S.C. § 1691a(b).

Contrary to the Eighth Circuit, CBR doesn't consider the Wives' obligations "collateral" or "secondary." CBR claims it can enforce the Wives' Guaranties without exhausting remedies against PHC or others. *E.g.*, Doc. 70 at 24; *accord Loy*, 77 S.W.3d at 38. CBR requested the Wives be held liable for "100% of the 'Indebtedness'" before obtaining a judgment against PHC, Gary Hawkins, or Chris Patterson. Doc. 70 at 34.

The Wives were primarily, absolutely, and unconditionally liable each time CBR renewed the Loans, and were parties to each renewal. The Wives participated in the "renewal, or continuation of credit." The Wives were credit "applicants" within the "zone of interests" protected by the ECOA.

C. The Eighth Circuit's *Hawkins* decision ignores the plain, ordinary meaning of the ECOA to reach an untenable conclusion.

Contrary to the FRB, the Eighth Circuit decided that the ECOA's definition of applicant unambiguously

excludes spousal guarantors. Pet. App. 4-11. Though a guarantor "desires for a lender to extend credit to a borrower," the Eighth Circuit concluded that a guarantor doesn't request credit or otherwise apply for credit by signing a guaranty. Pet. App. 6-11. The Eighth Circuit found that "***assuming a secondary, contingent liability*** does not amount to a request for credit" because a guarantor "engages in different conduct, receives different benefits, and ***exposes herself to different legal consequences than does a credit applicant.***"[4] Pet. App. 8 (emphasis added).

1. The Eighth Circuit reached the untenable conclusion that illegal contracts violating the ECOA can't be challenged by the Wives because they aren't "applicants."

The Eighth Circuit recognized that the Wives challenged the primary, absolute, and unconditional Guaranties as unenforceable violating the ECOA. Pet. App. 2-3. Nevertheless, the Eighth Circuit in a dizzying effort to justify dismissing the Wives' claims, stated that "[i]f [the Wives] do not qualify as applicants, then [CBR] did not violate the ECOA by requiring them

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[4] In stating that guarantors incur only "secondary" and "contingent" liabilities, the Eighth Circuit ignored CBR's claims and the record on appeal. CBR claims the Wives' guaranties are primary, absolute, and unconditional liabilities, and that CBR may collect from the Wives without first pursuing the borrowers or any collateral.

to execute the guaranties." Pet. App. 5. Stated differently, even though the ECOA and Regulation B prohibit requiring spouses to co-sign or guaranty debts, lenders aren't liable because the persons illegally required to sign can't sue.

Following this thought process to its logical end is like searching for the end to a long piece of yarn heaped in a pile on your Grandma's table – maybe if you dig long enough it can be found, but there are no assurances it can be untangled or used in any meaningful way. The Eighth Circuit leaves few clues as to where we can find such an end, and trumpets only a grossly oversimplified conclusion: "we conclude that a guarantor is not protected from marital status discrimination by the ECOA." Pet. App. 9.

But the Eighth Circuit's oversimplified conclusions exact a disservice on the black letter principle that illegal contracts are unenforceable. *Kaiser*, 455 U.S. at 78; *Silverman*, 51 F.3d at 33; *Meadors*, 753 F.2d at 593; *Kline*, 782 N.W.2d at 461; *Eure*, 448 S.E.2d at 419; *Boone*, 47 S.W.3d at 375; *King*, 495 S.W.2d at 77. Following the Eighth Circuit's tangled conclusions leads only to the logical end that persons signing illegal guaranties prohibited by the ECOA and Regulation B are defenseless against the illegal contract's enforcement.

For instance, under the Eighth Circuit's conclusions, persons being sued in federal court to enforce illegal guaranties violating the ECOA can't defend the illegal guaranties' enforcement. That is, according

to the Eighth Circuit, "a guarantor is not protected from marital-status discrimination by the ECOA" even though the contract violates the signature prohibitions.

Simply put, the federal courts will be required to lend themselves to the enforcement of illegal contracts directly contradicting this Court's holding in *Kaiser*. *See Kaiser*, 455 U.S. at 78 ("The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract."); *see also Silverman*, 51 F.3d at 33.

2. The Eighth Circuit's interpretation of "applicant" impermissibly narrows the ECOA's protection to only the borrowing entity that approaches the lender, and leaves individual minority business owners unprotected against discrimination because they don't meet the Eighth Circuit's technical definition of "applicant." The Sixth Circuit's interpretation correctly concludes additional persons/entities offering promises supporting an application can be "applicants."

The Eighth Circuit reasoned that the ECOA protects individuals who have "participated in the loan-application process." Pet. App. 11. The Eighth Circuit didn't elaborate on the extent to which individuals

must "participate" in the loan-application process to qualify as applicants, except to state that guarantors do not "participate" by virtue of signing their guaranties. Pet. App. 4-11. The Eighth Circuit determined that the Wives, based purely on their status as guarantors, couldn't be considered applicants. *Id.* The Eighth Circuit's lack of analysis is telling because it limits protection only to the borrowing entity who applied for the loan.

For example, under the Eighth Circuit's impermissibly narrow reading of "applicant," if the Wives formally had co-signed promissory notes with PHC, the Wives are "applicants." However, simply because the Wives signed as primarily, absolutely and unconditionally liable guarantors (in substance co-signing the Loans under Missouri law), the Wives aren't entitled to ECOA protection. The Eighth Circuit's narrow reading is circuitous and elevates form over substance.

The ECOA prohibits discrimination against "any applicant, with respect to any aspect of a credit transaction." 15 U.S.C. § 1691(a). The Eighth Circuit made an end-run around the "any aspect of a credit transaction" language. The Eighth Circuit ignored this expansive language and ruled, without definition or explanation, that ECOA protection is only afforded to participants in the "loan application process." Pet. App. 11.

What does this vague notion really mean? Is only the borrowing entity participating in "any aspect of a

credit transaction"? Is a lender-required spousal guarantor not participating? Did PHC's owners, Chris Patterson and Gary Hawkins, also guarantors, participate in the "loan application process"? If so, how was their participation different than the Wives'? These questions indict the Eighth Circuit's ruling.

Under the Eighth Circuit's narrow reading, if two minority women form a limited liability company to operate their business, and they are denied credit, they have no standing because the limited liability company is technically the "borrower" and the only "applicant." The Eighth Circuit followed neither its own precedent nor precedent from this Court. Rather than give *Chevron* deference to the FRB's congressionally delegated interpretation of "applicant" for "any aspect of a credit transaction," the Eighth Circuit, utilizing the fiction that the Wives' liability was "secondary" to that of PHC, imposed its "own construction on the [ECOA]." *Young*, 476 U.S. at 980 (quoting *Chevron*, 467 U.S. at 842-43).

The *Hawkins* concurrence squeezes the ECOA's scope even further by suffocating rights obviously protected. The *Hawkins* concurrence concludes that the ECOA unambiguously defines "applicant" as "the single person to whom credit would be extended, not a third party asking on behalf of the putative debtor." Pet. App. 12. According to the concurring *Hawkins* opinion, the ECOA "specifically envisions the involvement of a third party who requests an extension of credit to a first-party applicant, but distinguishes between the third party requestor and the 'applicant.'"

Pet. App. 13. The *Hawkins* concurrence concludes that the "'applicant' is the party to whom credit will be extended"; therefore, only the corporate borrower qualifies as an ECOA credit applicant. Pet. App. 14.

The ECOA expressly recognizes that a "person" under the definition of "applicant" includes "a corporation trust, estate, partnership, cooperative, or association." 15 U.S.C. § 1691a(f). Who constitutes a "cooperative" or "association"?

If condominium owners who are primarily minorities form a non-profit corporation to manage the "association" which is denied credit, is the race-less, non-profit corporation the "putative debtor" and only party with standing? When the race-less, non-profit association brings a claim for ECOA race discrimination, will they not face the specious arguments under the "putative debtor" pretext that a corporation has no race, and therefore can't assert a claim? Are the actual condominium owners who comprise the non-profit corporation the real parties who have suffered discrimination? If only the entity-borrower can be an "applicant," who possesses the race, gender, marital status, age, or religion of the entity-borrower?

3. The ECOA and Regulation B protect individuals such as Valerie Hawkins and Janice Patterson from financial ruin resulting from their spouses' failed business ventures. The Eighth Circuit's interpretation of "applicant" removes spousal guarantors from the ECOA's protection, permits destruction of disinterested spouses' creditworthiness, and promotes credit discrimination against married women.

Small business owners like Gary Hawkins are often mandated to obtain spousal guaranties as a condition for a commercial loan. By requiring the spouse to guaranty credit to a borrowing entity in which that spouse has no interest or position, the lender requires the spousal guarantor to incur (often extensive) liability solely based on marital status.

The disinterested spousal guarantor doesn't control significant liabilities resulting from business failures. These liabilities impair the spouse's creditworthiness, often making it impossible to independently qualify for future credit.

For example, Valerie Hawkins, according to CBR's allegations, was primarily, absolutely, and unconditionally liable for over $2 million. If lenders are permitted to require uninterested spousal guaranties, credit will be unavailable to otherwise creditworthy, married applicants such as Valerie Hawkins. *See Anderson v. United Fin. Co.*, 666 F.2d 1274, 1277 (9th Cir. 1982).

Curiously, the Eighth Circuit concluded that the ECOA's policies "focus on ensuring fair access to credit by preventing lenders from excluding borrowers from the credit market based on the borrowers' marital status." Pet. App. 9. The Eighth Circuit claims that the ECOA's purpose does not extend to spousal guarantors who claim to have been improperly *included* in the lending process, rather than *excluded* due to marital status. Pet. App. 9-10. The Eighth Circuit's analysis ignores damage to the disinterested spouse's independent creditworthiness caused by spousal guaranties required by lenders.

Here, CBR required Valerie Hawkins to execute personal guaranties which CBR claims require her to individually repay the Loans. Ms. Hawkins holds no ownership interest, position, or other interest in PHC. CBR required that she execute personal guaranties as a condition for PHC, her husband's small business, to receive credit from CBR.

Married applicants saddled with their spouse's debt are unbankable and unable to independently qualify for credit. Regulation B's inclusion of spousal guarantors as "applicants" "best effectuate[s] the ECOA's goal of preventing discrimination based upon marital status." *Empire Bank*, 2013 WL 6238605, at *6. The Eighth Circuit's decision eliminates "entire aspects of the Federal Reserve Board's implementation scheme," including protection for spousal guarantors. *See Citgo Petroleum Corp. v. Bulk Petroleum Corp.*, No. 08CV654, 2010 WL 3931496, at *9 (N.D. Okla. Oct. 5, 2010).

Here, the Eighth Circuit's substitution of its judgment for the FRB's ignores the Wives' position at each loan renewal. The computer-generated form guaranties routinely utilized by CBR and other lenders impose primary, absolute, and unconditional liability. At each renewal, Valerie Hawkins, who CBR claims is primarily, absolutely, and unconditionally liable for over $2 million, certainly wanted "an extension, renewal or continuation of credit" as provided under the ECOA. 15 U.S.C. § 1691a(b).

Under the Eighth Circuit's narrow reasoning, a "primarily and unconditionally liable" spousal guarantor who wants to renew, extend or continue the credit isn't an "applicant" because Congress unambiguously intended to exclude them from the ECOA's protections because they didn't participate in the initial "loan-application process." The Eighth Circuit's conclusion ignores that an "applicant" for "any aspect of a credit transaction" includes loan renewals.

4. Congress does not enact meaningless legislation prohibiting discrimination against persons which can never be enforced. An ECOA "applicant" includes corporate entities which have no race, gender, or marital status, making it impossible to discriminate against these corporate entities without considering those persons identified with and connected to the corporation. The Eighth Circuit's flawed ECOA interpretation concludes that lenders may lawfully deny credit based on the race, gender, marital status, age or religion of individuals owning small corporations without violating the ECOA, opening the floodgates to lender discrimination against closely-held business owners without consequence.

The *Hawkins* concurring opinion trumpeted by CBR leaves the ECOA's discriminatory prohibitions against small corporations meaningless. For instance, the *Hawkins* concurrence reasoned that a corporate-borrower qualifies as an ECOA credit "applicant," but not the individuals standing behind the entity. Pet. App. 13.

This enables lenders to discriminate against owners based on race, gender, marital status, age, or religion without ECOA violation. After *Hawkins*, small corporation owners now are subject to the

obvious discriminatory pretext that the corporation has no race or gender, and thus cannot be discriminated against.

The *Hawkins* concurrence also runs counter to the ECOA reporting requirements. The reporting requirements mandate that lenders "compile and maintain" information on "women-owned" and "minority-owned" credit applications, including the "race, sex, and ethnicity of the principal owners of the business." 15 U.S.C. § 1691c-2(b), (e)(2)(G). CBR, however, argues that 15 U.S.C. § 1691c-2(3)'s prohibition on including the "name, specific address and telephone number concerning any individual who is, or is connected with, the women-owned, minority-owned" business loan somehow illustrates that the ECOA unambiguously excludes guarantors from protection. *See* Brief in Opp. to Pet. at 34.

CBR's argument and the *Hawkins* concurrence overlook the obvious: the ECOA expressly requires race and gender information germane to discriminatory conduct by identifying the individual race and gender for persons standing behind the entity-borrower. Contrary to CBR's suggestion, the ECOA's reporting requirements illustrate Congress's recognition that the ECOA's discriminatory prohibition can't be measured without considering the race, gender, and ethnicity of the individuals "connected with" the entity-borrower. Limiting the ECOA's protections to only the entity-borrower renders the ECOA meaningless.

D. Where the "harm alleged has a sufficiently close connection to the conduct the statute prohibits," a plaintiff satisfies the proximate-cause requirement. The Wives' claimed credit reputation injury is sufficiently closely connected to CBR's marital status discrimination requiring the Wives to co-sign for their husbands' business debt. The Wives satisfy the proximate-cause requirement.

Statutory claims are "limited to plaintiffs whose injuries are proximately caused by violations of the statute." *Lexmark*, 134 S. Ct. at 1390. Statutory standing isn't afforded to plaintiffs remotely damaged by the defendant's unlawful conduct. *Id.* This "proximate cause analysis" turns on whether "the harm alleged has a sufficiently close connection" to the prohibited conduct. *Id.*

Here, CBR's ECOA violations directly damaged the Wives. The Wives' Complaint claims CBR discriminated against the Wives based on their marital status by requiring the Wives to sign primary, absolute, and unconditional guaranties as a condition for extending and renewing the applied-for Loans.[5]

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[5] CBR does not challenge the validity of § 202.7(d)(1). Section 202.7(d)(1) prohibits a creditor from requiring "the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for

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Actual damages resulting from an ECOA violation may include injury to credit reputation, mental anguish, humiliation, or embarrassment. *Anderson*, 666 F.2d at 1277-78; *Sayers v. General Motors Acceptance Corp.*, 522 F. Supp. 835, 841 (W.D. Mo. 1981).

By requiring the spouse to co-sign for credit to a borrowing entity in which that spouse has no interest or position, the lender requires the spouse to incur (often extensive) liability solely based on marital status. The disinterested spousal guarantor doesn't control significant liabilities resulting from business failures. These liabilities impair the spouse's credit reputation, often making it impossible to independently qualify for future credit.

For example, CBR claims Valerie Hawkins is primarily, absolutely, and unconditionally liable for over $2 million. If lenders are permitted to require uninterested spousal guaranties, credit will be unavailable to otherwise creditworthy, married applicants such as Valerie Hawkins.

Here, CBR required Valerie Hawkins to execute personal guaranties which CBR claims require her to individually repay the Loans. Ms. Hawkins holds no ownership interest, position, or other interest in

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the amount and terms of the credit requested." *See also* 15 U.S.C. § 1691a(g) ("Any reference to any requirement under this subchapter or any provision thereof includes reference to the regulations of the Bureau under this subchapter or the provision thereof in question").

PHC. CBR required that she execute personal guaranties as a condition for PHC, her husband's small business, to receive credit from CBR. Married applicants saddled with their spouse's debt become unbankable and unable to independently qualify for credit.[6] The Wives' credit-reputation injury "has a sufficiently close connection" to the prohibited conduct. *Lexmark*, 134 S. Ct. at 1390.

E. Contracts prohibited by law are void and unenforceable, and the ECOA provides equitable and declaratory relief necessary to enforce the ECOA's prohibitions. The Wives alleged that CBR required them to incur personal liability in violation of federal law. The Wives can seek ECOA equitable and declaratory relief for CBR's federal law violations.

Contracts prohibited by law are void, and can't be enforced in law or in equity. *Kaiser*, 455 U.S. at 77-78; *Boone*, 47 S.W.3d at 375-76; *King*, 495 S.W.2d at 77; *see also Silverman*, 51 F.3d at 33; *Kline*, 782 N.W.2d at 461-62; *Eure*, 448 S.E.2d at 419.

Courts don't carry out contracts rooted in illegal acts because such contracts are void from inception.

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[6] Regulation B's inclusion of spousal guarantors as "applicants" "best effectuate[s] the ECOA's goal of preventing discrimination based upon marital status." *Empire Bank*, 2013 WL 6238605, at *6.

Kaiser, 455 U.S. at 84. Here, the Wives' Complaint sought declaratory relief that the Guaranties are void. A contract procured in violation of Regulation B is null and void. *See Boone*, 47 S.W.3d at 373; *see also Frontenac Bank v. T.R. Hughes, Inc.*, 404 S.W.3d 272, 291 (Mo. Ct. App. 2012); *Kline*, 782 N.W.2d at 462. The Wives satisfy the proximate-cause requirement.[7]

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[7] The Wives also alleged that CBR's violations caused other damages, including attorneys' fees, mental anguish, humiliation, and embarrassment.

II. Parties to an illegal contract possess standing to invalidate the contract as illegal and unenforceable regardless of statutory standing. No one disputes that the Wives' Complaint claims CBR required illegal contracts violating 12 C.F.R. § 202.7(d) and the ECOA. The Wives possess standing to invalidate illegal contracts regardless of any standing under 15 U.S.C. § 1691e.

A. Declaratory judgment actions allow parties to determine rights prior to suit for coercive remedies. Suits to declare contracts illegal are suits to declare the parties' contract rights prior to seeking coercive remedies for breach. Contract parties have standing to bring declaratory actions to establish the contract's illegality.

The Declaratory Judgment Act authorizes federal courts to determine the parties' rights upon request of a party to an actual controversy. *See* 28 U.S.C. § 2201(a) ("In a case of actual controversy within its jurisdiction, any court of the United States may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.").

Declaratory judgment actions provide avenues to determine rights without waiting to get sued. *See, e.g.*, *United Food & Commercial Workers Local Union Nos. 137, 324, 770, 899, 905, 1167, 1222, 1428, & 1442 v. Food Emp'rs Council, Inc.*, 827 F.2d 519, 524

(9th Cir. 1987); *see also* Wright, Miller, & Kane, *Purpose of Declaratory Judgments*, 10B Fed. Prac. & Proc. Civ. § 2751 (3d ed.) ("[The declaratory judgment remedy] gives a means by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy and in cases in which a party who could sue for coercive relief has not yet done so.").

The existence of an actual controversy under the Declaratory Judgment Act turns on "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

Disputes over a contract's legality present a "case of actual controversy." *See United Food*, 827 F.2d at 522-23; *cf. Kaiser*, 455 U.S. 72 ("[O]ur cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law."). That is, one party seeks to preserve the contract's enforceability, and the other seeks its invalidation. This presents a "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *See United Food*, 827 F.2d at 523 (quoting *Md.*

Cas. Co., 312 U.S. at 273).[8] A contract's invalidation as illegal redresses the harms occasioned by enforcement. *See id.* at 524.

Here, the Wives' Complaint alleges CBR violated the ECOA by requiring illegal Guaranties. CBR claims the Guaranties are enforceable. The parties "persist[ ] in their conflicting legal positions." A suit declaring the Guaranties illegal is a case of actual controversy.

Thus, the Wives possess standing to seek declaratory relief invalidating the Guaranties as illegal. This standing exists regardless of 15 U.S.C. § 1691e(c)'s standing provided to "aggrieved applicants." That is, whether or not this Court determines the Wives are "aggrieved applicants" under § 1691e(c), as parties to contracts over which there exists a dispute as to illegality, the Wives have standing to ask a court[9] to declare such contracts illegal and unenforceable.

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[8] Missouri has a similar statute. *See* Mo. Rev. Stat. § 527.010; *see also Citizens Ins. Co. of Am. v. Leiendecker*, 962 S.W.2d 446, 449 (Mo. Ct. App. 1998) (contracting parties who dispute the enforceability of the contract present justiciable controversy under Missouri law); Mo. Rev. Stat. §§ 527.020, 527.030 (Missouri courts can construe parties' contract rights either before or after breach via declaratory judgment).

[9] The federal Declaratory Judgment Act does not confer subject matter jurisdiction but rather provides an express declaratory remedy in cases within the courts' jurisdiction. *See* 28 U.S.C. § 2201(a) ("In a case of actual controversy within its jurisdiction. . . ."). Thus, whether a contracting party could file its claim in federal court depends on the existence of federal subject matter jurisdiction apart from the Declaratory Judgment Act. *See United Food*, 827 F.2d at 523.

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The District Court, however, purportedly found that the Wives lacked standing to seek a declaration that the Guaranties are illegal and unenforceable. Pet. App. 17. To the extent that the Eighth Circuit's ruling affirmed, the Eighth Circuit erred. If this Court affirms the Eighth Circuit's ruling that the Wives lacked standing to bring affirmative claims under the ECOA, this Court must reverse the District Court's ruling that the Wives lack standing to challenge the Guaranties' legality.

B. The ECOA, under 12 C.F.R. § 202.7(d), prohibits requiring spousal guaranties. CBR hasn't challenged § 202.7(d)'s validity, and the Wives' Complaint claims CBR required the Wives' guaranties under the proscribed circumstances. The Wives' Complaint claims CBR violated the ECOA, and the Wives' guaranties are illegal.

Since its enactment, Regulation B has prohibited creditors from requiring spousal signatures. *See* 12

The Wives and CBR are not diverse, and a suit to collect on the Guaranties presents no federal question. *See id.* (whether subject matter jurisdiction exists in a federal declaratory action depends on the nature of the declaratory judgment defendant's potential coercive suit); *see also Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 248 (1952). Thus, the Wives' defensive declaratory action couldn't be filed in federal court unless this Court determines that spousal guarantors can bring an affirmative ECOA claim, providing federal subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1367.

C.F.R. § 202.7 (1975). Regulation B states, in part, that "[a] creditor shall not require the signature of an applicant's spouse or other person on a credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested." 12 C.F.R. § 202.7(d)(1). Regulation B also provides that if an additional party is necessary to support the credit requested "[t]he applicant's spouse may serve as an additional party, but the creditor shall not require that the spouse be the additional party." 12 C.F.R. § 202.7(d)(5).

In Regulation B's forty (40) years, Congress hasn't narrowed the ECOA's spousal guaranty prohibition. CBR hasn't challenged § 202.7(d). The Eighth Circuit didn't consider the FRB's authority to prohibit spousal guaranties in § 202.7(d). There is no dispute the Wives' Complaint claims CBR violated the ECOA[10] by requiring the Spouses' guaranties: 12 C.F.R. § 202.7(d) prohibits precisely this practice, and CBR hasn't challenged the validity of § 202.7(d).

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[10] CBR's violation of Regulation B constitutes a violation of the ECOA. *See* 15 U.S.C. § 1691a(g) ("Any reference to any requirement under this subchapter or any provision thereof includes reference to the regulations of the Bureau under this subchapter or the provision thereof in question").

III. When Congress delegates an agency authority to fill any explicit or implicit statutory "ambiguity" or "gap," courts grant deference to the agency's reasonable interpretation. Congress expressly delegated the FRB broad authority to prescribe regulations effectuating the ECOA's purposes. If Congress's definition of "applicant with respect to any aspect of a credit transaction" is ambiguous concerning primarily, absolutely, and unconditionally liable guarantors, the Court should defer to the FRB's reasonable interpretation.

A. Congress intended that ECOA "applicants" include "debtors" contractually liable to pay the applied-for debt. The FRB's 1985 Regulation B clarifying amendment underscores Congress's intent that "debtor-applicants" possess ECOA standing. This Court should defer to the FRB's reasonable clarifying amendment.

Congress intended that primarily, absolutely, and unconditionally liable guarantors fall within the ECOA's definition of "applicant with respect to any aspect of a credit transaction." *See supra* at Part I. The "zone of interests" protected by the ECOA encompass primarily, absolutely, and unconditionally liable guarantors.

The FRB's 1985 Regulation B clarifying amendment fulfills Congress's intent that "debtor-applicants,"

including primarily, absolutely, and unconditionally liable guarantors, have ECOA standing. This Court should defer to the FRB's reasonable interpretation. *See Beeler*, 651 F.3d at 959 ("*Chevron* deference is appropriate 'when it appears that Congress delegated authority to the agency to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'" (quoting *Mead*, 533 U.S. at 226-27)).

B. Congress intended that an ECOA "applicant with respect to any aspect of a credit transaction" includes primary, absolute, and unconditional guarantors. But, if Congress didn't answer this precise question, then Congress expressly empowered the FRB to address any gap or ambiguity consistent with the ECOA's purpose. The FRB properly exercised its authority by including guarantors within the ECOA's definition of "applicant."

As noted above, Congress intended that primarily, absolutely, and unconditionally liable guarantors fall within the ECOA's definition of "applicant with respect to any aspect of a credit transaction." The "zone of interests" protected by the ECOA encompass primarily, absolutely, and unconditionally liable guarantors.

If, however, Congress didn't answer precisely that "applicant[s] with respect to any aspect of a

credit transaction" includes primarily, absolutely, and unconditionally liable guarantors, then the FRB filled the gap through its clarifying amendment. Official Staff Interpretations, 12 C.F.R., Part 202, Supp. I (Aug. 15, 2011) (analyzing § 202.7(d)(5) and stating "a guarantee on an extension of credit is part of a credit transaction and therefore subject to the regulation"); *see also Chevron*, 467 U.S. at 843-44 (when Congress has "explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.").

"[A]ny ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *Mead*, 533 U.S. at 227; *see also E.P.A. v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1604 (2014) ("[A] full understanding of the force of the statutory policy depends upon more than ordinary knowledge of the situation, [therefore] the administering agency's construction is to be accorded controlling weight unless arbitrary, capricious, or manifestly contrary to the statute." (internal quotation marks omitted)).

Here, Congress expressly delegated the FRB[11] authority to "prescribe regulations" that "in the

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[11] The 2010 amendments to the ECOA vested the authority to promulgate regulations under the statute to the Consumer Financial Protection Bureau. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1085(1), 124 Stat. 1376, 2083 (2010).

judgment of the [FRB] are necessary or proper to effectuate the purposes" of the ECOA, "to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith." 15 U.S.C. § 1691b(a). Using this broad statutory authority, the FRB implemented Regulation B in 1975.

Regulation B states, in part, that "[a] creditor shall not require the signature of an applicant's spouse or other person on a credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested." 12 C.F.R. § 202.7(d)(1). Regulation B further states that if an additional party is necessary, "[t]he applicant's spouse may serve as an additional party, but the creditor shall not require that the spouse be the additional party." 12 C.F.R. § 202.7(d)(5). CBR violated § 202.7(d)(1) and (5) by requiring the Wives to sign spousal guaranties.

Regulation B originally excluded guarantors from enforcing the ECOA. In 1985, however, the FRB amended Regulation B to include guarantors as "applicants" for the limited purpose of § 202.7(d), affording spousal guarantors unlawfully required to sign guaranties standing to seek legal remedies. *See* 12 C.F.R. § 202.2(e); Equal Credit Opportunity; Revision of Regulation B; Official Staff Commentary, 50 Fed. Reg. 48,018, 48,020 (Nov. 20, 1985). Regulation B, under 12 C.F.R. § 202.2(e), interprets the ECOA to afford the Wives statutory standing to bring claims for CBR's ECOA and § 202.7(d) violations.

The ECOA makes it "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction." The Eighth Circuit erroneously concluded that "applicant" doesn't include primarily, absolutely, and unconditionally liable guarantors when a loan transaction is extended, renewed, or continued. The FRB obviously disagrees. Rather than give *Chevron* deference to the FRB's congressionally-delegated interpretation of "applicant" for "any aspect of a credit transaction," the Eighth Circuit, utilizing the fiction that the Wives' liability was "secondary" to that of PHC, imposed its "own construction on the [ECOA]." *Young*, 476 U.S. at 980 (quoting *Chevron*, 467 U.S. at 842-43). This Court should instead defer to the FRB's reasonable interpretation.

C. When Congress charges an agency to implement and enforce a statute, then deference is granted to the agency's statutory interpretation. Congress expressly delegated to the FRB broad authority to prescribe regulations to effectuate the ECOA's purposes. The Eighth Circuit failed to follow binding authorities by substituting its own construction of "applicant" for the decades-long reasonable interpretation made by the FRB.

Congress expressly delegated authority to the FRB to "prescribe regulations" that "in the judgment of the [FRB] are necessary or proper to effectuate the

purposes" of the ECOA, "to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith." 15 U.S.C. § 1691b(a). The FRB followed its congressional directive and interpreted the term "applicant" promulgating Regulation B to effectuate the purposes of the ECOA. It is well-settled that the agency's interpretation of the statute it is charged to administer is entitled to great deference:

> This view of the agency charged with administering the statute is entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction that [the agency] might have adopted but only that [the agency's] understanding of this very "complex statute" is a sufficiently rational one to preclude a court from substituting its judgment for that of [the agency].

Young, 476 U.S. at 981 (alterations in original).

"*Chevron* deference is appropriate when it appears that Congress delegated authority to the agency to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Beeler*, 651 F.3d at 959 (quoting *Mead*, 553 U.S. at 226-27).

Finally, the ECOA "has undergone several amendments since the Federal Reserve included guarantors within the definition of 'applicant' – including an extensive amendment after *Moran*[12] was

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[12] *Moran Foods, Inc. v. Mid-Atl. Mkt. Dev. Co.*, 476 F.3d 436 (7th Cir. 2007).

decided – and none has clarified that the term 'applicant' cannot include guarantors." *RL BB Acquisition*, 754 F.3d at 386. "[C]ongressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Young*, 476 U.S. at 983 (quoting *N.L.R.B.*, 416 U.S. at 275). Congress's decision to leave unchanged the FRB's ECOA interpretation and promulgation of Regulation B did not give the Eighth Circuit license to substitute its judgment for the FRB's. *Chevron*, 467 U.S. at 844 ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").[13]

D. An agency's interpretation that fulfills the statute's purpose is "within the bounds" of the agency's authority and reasonable. The FRB's ECOA interpretation and 1985 Regulation B clarifications that spousal guarantors are applicants fulfill the ECOA's purpose to eradicate marital discrimination in credit transactions. FRB's clarifying amendment is reasonable and entitled to deference.

Under *Chevron*, the Court presumes that when an agency-administered statute is ambiguous regarding

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[13] Unlike the Eighth Circuit, the Sixth Circuit is unwilling to "strike down a valid regulation to salvage bad underwriting" and "invalidate a regulation over a disagreement with an agency's policy which Congress has had time and opportunity to reverse." *RL BB Acquisition*, 754 F.3d at 386.

what it prescribes, "Congress has empowered the agency to resolve the ambiguity. The question for a reviewing court is whether in doing so the agency has acted reasonably and thus has 'stayed within the bounds of its statutory authority.'" *Utility Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2439 (2014) (quoting *Arlington v. F.C.C.*, 133 S. Ct. 1863, 1868 (2013)); *Chevron*, 467 U.S. at 844 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. " (footnote omitted)).

Congress expressly granted the FRB authority to "prescribe regulations" that "in the judgment of the [FRB] are necessary or proper to effectuate the purposes" of the ECOA, "to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith." 15 U.S.C. § 1691b(a).

Congress articulated the ECOA's purpose:

> The Congress finds that there is a need to insure that the various financial institutions and other firms engaged in the extensions of credit exercise their responsibility to make credit available with fairness, impartiality, and without discrimination on the basis of sex or marital status. It is the purpose of this Act to require that financial institutions and other firms engaged in the extension of credit make that credit equally available to

> all credit-worthy customers without regard to sex or marital status.

Pub. L. No. 93-495, § 502.

Regulation B's purpose mirrors the ECOA's purpose:

> The purpose of this regulation is to promote the availability of credit to all creditworthy applicants without regard to race, color, religion, national origin, sex, marital status, or age. The regulation prohibits creditor practices that discriminate on the basis of any of these factors.

12 C.F.R. § 202.1(b).

Consistent with the ECOA's broad purpose, the FRB proposed revisions to Regulation B in March 1985 against a backdrop of decisions[14] denying

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[14] *See, e.g., Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 595 F. Supp. 800 (E.D. Pa. 1984) (creditor required husband/general partner and his wife to sign guaranties for a loan to husband's business; court determined that because the husband signed continuing guaranty as a guarantor, he was not an "applicant"); *Morse v. Mut. Fed. Sav. & Loan Assoc. of Whitman*, 536 F. Supp. 1271, 1278 (D. Mass. 1982) (wife whose signature was required on husband's promissory note was not an aggrieved applicant because she signed the note as a guarantor); *Delta Diversified, Inc. v. Citizens & Southern Nat'l Bank*, 320 S.E.2d 767, 771 (Ga. Ct. App. 1984) (principal shareholders and officers of corporation and their wives who personally guaranteed corporation's debt were not "applicants" and could not raise credit discrimination defense based on marital status).

standing to both business owner guarantors and spousal guarantors. Equal Credit Opportunity; Revision of Regulation B; Official Staff Commentary, 50 Fed. Reg. 10,890, 10,891 (Mar. 18, 1985). The FRB clarified that the ECOA intended guarantors and similar parties to have standing to seek legal remedies when a 202.7(d) violation occurs. *Id.* The FRB proposed defining guarantors as applicants "to resolve the question of standing." *Id.* The FRB requested comment "on whether specific exclusion of guarantors from coverage under other sections is appropriate." *Id.*

The FRB received 166 comments on its proposal from creditors, Federal Reserve Banks, federal and state agencies, trade associations, consumer groups, and others. Equal Credit Opportunity; Revision of Regulation B; Official Staff Commentary, 50 Fed. Reg. 48,018, 48,018 (Nov. 20, 1985). The FRB received "concerns of industry commentators who believed that the unlimited inclusion of guarantors and similar parties in the definition might subject creditors to a risk of liability for technical violations of various provisions of the regulation." *Id.* The FRB revised the final version of the definition in response, including guarantors and similar parties as "applicants" only "for purposes of § 202.7(d)." *Id.*

FRB's 1985 clarifying amendment didn't unreasonably expand the ECOA's scope. FRB revised its definition of applicant:

> on the premise that although its primary concern may have been to protect the individual seeking credit, the Congress had a broader purpose in enacting the ECOA: to bar discrimination on the basis of marital status in any aspect of a credit transaction. Clearly, a person required to assume a debt obligation merely by virtue of being married to the applicant has suffered discrimination based on marital status.

Delores S. Smith, *Revision of the Board's Equal Credit Regulation: An Overview*, 1985 FEDERAL RESERVE BULLETIN 913, 918-19 (Dec. 1985).

"Given the industry concerns about lawsuits unrelated to signature violations, however, the Board revised the definition of applicant to include guarantors and similar parties only for purposes of the signature rules." *Id.* at 919. "The rule change is also consistent with the congressional intent for enforcement through private lawsuits because it gives the guarantor the right to bring a lawsuit or file a counterclaim against a creditor." *Id.*

Previously, the 1977 Regulation B amendment defined "Applicant" to include "any person who requests or who has received an extension of credit from a creditor, and includes any person who may be contractually liable regarding an extension of credit, other than a guarantor, surety, endorser, or similar party." *See* 12 C.F.R. § 202.2(e) (1977). The 1985 Regulation B amendment left unchanged that "applicant" includes "any person who may be contractually

liable regarding an extension of credit, but clarified that "applicant" includes "guarantors, sureties, endorsers, and similar parties" "[f]or purposes of § 202.7(d)." 12 C.F.R. § 202.2(e) (2015).

A primarily, absolutely, and unconditionally liable guarantor is certainly a person "contractually liable regarding an extension of credit." FRB's 1985 clarifying amendment did nothing more than restate the obvious: primarily, absolutely, and unconditionally liable guarantors have ECOA standing.

Utilizing its statutorily delegated authority to prescribe regulations "to effectuate the purposes" of the ECOA and "to prevent circumvention or evasion thereof," FRB clarified that "guarantors and similar parties [have] standing to seek legal remedies when a violation occurs under [the signature requirements of] § 202.7(d)." Equal Credit Opportunity; Revision of Regulation B; Official Staff Commentary, 50 Fed. Reg. 48,018, 48,020 (Nov. 20, 1985).

The FRB didn't exceed the "bounds of its statutory authority." *Utility Air Regulatory Group*, 134 S. Ct. at 2439. The FRB fashioned the 1985 amendment to both foster Congress's purpose to bar discrimination on the basis of marital status in any aspect of a credit transaction and address banking industry concerns that "unlimited inclusion of guarantors might subject creditors to a risk of liability for technical violations of various provisions of the regulation." 50 Fed. Reg. at 48,020.

The FRB's interpretation is "within the bounds of reasonable interpretation" and permissible. *Arlington*, 133 S. Ct. at 1868; *see also Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 75 (1975) (agency's construction need not be "the only one it permissibly could have adopted"; concluding agency construction "was at the very least sufficiently reasonable it should have been accepted by the reviewing courts").

CONCLUSION

Ignoring the well-settled principle that illegal contracts are unenforceable, the Eighth Circuit proclaimed that "[i]f [the Wives] do not qualify as applicants, then [CBR] did not violate the ECOA by requiring them to execute the guaranties." Pet. App. 5. Thus, according to the Eighth Circuit's jaundiced view, lenders can automatically require spouses to co-sign or guaranty debts – an act undisputedly prohibited by the ECOA and Regulation B – with impunity because the persons signing can't sue.

Congress intended that primarily, absolutely, and unconditionally liable guarantors fall within the ECOA's definition of "applicant with respect to any aspect of a credit transaction." The "zone of interests" protected by the ECOA obviously encompass this. Petitioners have statutory standing.

If, however, Congress didn't answer precisely that "applicant with respect to any aspect of a

credit transaction" includes primarily, absolutely, and unconditionally liable guarantors, then the FRB reasonably filled the gap through its clarifying amendment. Congress expressly delegated the FRB authority to "prescribe regulations" necessary in its judgment to effectuate the ECOA's purposes. Using this broad statutory authority, the FRB did just that by implementing Regulation B which has since inception prohibited creditors from automatically requiring spousal signatures to co-sign or guaranty debts.

The Eighth Circuit, however, erroneously concluded that "applicant" doesn't include primarily, absolutely, and unconditionally liable guarantors. The FRB obviously disagrees. Rather than give *Chevron* deference to the FRB's congressionally-delegated interpretation of "applicant" for "any aspect of a credit transaction," the Eighth Circuit, utilizing the fiction that the Wives' liability was "secondary" to that of PHC, impermissibly substituted its judgment for the FRB's and made its own ECOA construction. This Court should instead defer to the FRB's reasonable interpretation.

For the foregoing reasons, Petitioners request this Court reverse the Eighth Circuit Court of Appeals' holding that the ECOA's definition of "applicant" unambiguously excludes guarantors, and reverse the District Court's ruling in all respects including that Petitioners have no standing to seek

ECOA civil remedies such as challenging the Guaranties' legality. Petitioners also request remand of this proceeding to the District Court for resolution on the merits.

Respectfully submitted,

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No. 14-520

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In the Supreme Court of the United States

VALERIE J. HAWKINS AND JANICE A. PATTERSON,
Petitioners,

v.

COMMUNITY BANK OF RAYMORE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTION PRESENTED

Petitioners and the Government fail to focus on the determinative *legal* issue now before the Court. The Equal Credit Opportunity Act specifically defines an "applicant" protected from discrimination and authorized to bring a claim under the Act's express right of action as "any person who *applies* to a creditor *directly* for an extension, renewal, or continuation of *credit*," 15 U.S.C. §1691a(b) (emphasis added). The question this case presents is:

Does the ECOA's precise definition of "applicant," when given its ordinary meaning and read in the context of the statute as a whole, include a *guarantor*, who merely signs a contract in support of the borrower's application for credit, or did the Federal Reserve Board attempt to redefine impermissibly the statute's "applicant" provision when the FRB amended its implementing regulation (Regulation B) to expressly *include* guarantors?

CORPORATE DISCLOSURE

Respondent Community Bank of Raymore is a wholly-owned subsidiary of LoLyn Financial Corporation, a Missouri corporation. There is no publicly-held corporation that owns ten percent or more of Respondent's stock.

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STATEMENT OF THE CASE

A. Community Bank Of Raymore Made Four Loans To PHC Development, LLC, From 2005 To 2008, For A Total Of More Than $2 Million. Petitioners Hawkins And Patterson Each Signed Sixteen Guaranties For The Loans To PHC.

In 2004, Gary Hawkins, a successful certified public accountant, and Chris Patterson, one of Gary Hawkins' business clients, formed a limited liability company, PHC Development, LLC ("PHC"), to acquire and develop a residential subdivision in Peculiar, Missouri. PHC is owned by Gary Hawkins personally, and by Chris Patterson in his capacity as a trustee of the Chris L. Patterson and Janice A. Patterson Trust (the "Trust").[1] Petitioners Valerie Hawkins ("Hawkins") and Janice Patterson ("Patterson"), well-educated and sophisticated business and professional women, are married to Hawkins and Patterson, respectively. Pet. App. 1-2; Record on Appeal ("ROA") A689; A732-A733.

Between 2005 and 2008, PHC applied for and obtained four commercial loans totaling more than $2 million from Community Bank of Raymore ("CBR") to finance the acquisition and development of the

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[1] Patterson is a co-trustee and beneficiary of the Trust. Funds to acquire the PHC-membership interest and pay capital contributions were made by Patterson from the Pattersons' jointly-owned account held in the name of their d/b/a, "Patterson Enterprises." ROA A1190, A1368, A1382-A1400, A1408:9-14, A1409:6-A1410:20.

subdivision in Peculiar.[2] From 2007 through 2010, the loans, collectively, were modified, extended and renewed twelve times. Pet. App. 2; ROA A1191-A1192. "In connection with each loan and each modification, Hawkins, Patterson, and their husbands executed personal guaranties in favor of [CBR] to secure the loans." Pet. App. 2; A1192-A1193.[3] Ultimately, Hawkins, Patterson and the other guarantors each signed a total of sixteen guaranties.

Pursuant to the original guaranties Petitioners signed in connection with the first three loans, Petitioners affirmatively represented and warranted, in writing, that the guaranties were "entered into at the request of [PHC]." *See, e.g.*, ROA A96.[4]

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[2] Peculiar and Raymore are adjoining cities just outside of Kansas City, Missouri, and are effectively suburbs of the greater metropolitan area.

[3] The loans and several of the Pattersons' guaranties were secured by one or more deeds of trust on the subdivision and/or one of the Pattersons' convenience stores, known as the "Rush Hour." The Rush Hour was owned by one of the Pattersons' limited liability companies, Patterson Raymore, LLC ("Patterson Raymore"), which is also owned by the Trust. Pet. App. 2; ROA A732, A1191, A1193-A1194.

[4] As the Eighth Circuit recognized, "under Missouri law, which governs the loans and guaranties in this case, 'co-ownership of property by a husband and wife creates a presumption of tenancy by the entirety.'" Pet. App. 10 n. 6 (citation omitted). "The distinctive characteristic of an estate by the entirety is that it is deemed to be owned by a single entity, the marital community .... Because the estate is deemed to be owned by a single entity, neither spouse has any interest which may be conveyed, encumbered or devised by his or her *sole* act." *Jennings v.*

In the thirteen additional guaranties Petitioners subsequently signed, Petitioners expressly declared, in writing, that "no representations or agreements of any kind" were made to them "which would limit or qualify in any way the terms of [their guaranties]"; that their guaranties were being "executed at [PHC's] request and not at the request of [CBR]"; that their guaranties "do not result in a violation of any law [or] regulation applicable to Guarantor"; that they read, understood and agreed to the terms of their guaranties; that the guaranties fully reflected their intentions; and that they had an opportunity to consult with legal counsel prior to signing them. *See, e.g.*, ROA A254-A255.[5]

Each of the guaranties Petitioners signed was an "absolute and unconditional" guaranty of payment, rather than a guaranty of collection. Thus, upon default by PHC, Petitioners' guaranties authorized CBR to proceed directly against Petitioners, rather than first attempting to recover from PHC. *See, e.g.*, App. A 2-4, 17-18. 38A C.J.S. *Guaranty* §51 (2015) ("A guaranty of

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Atkinson, 456 S.W.3d 461, 465-66 (Mo. Ct. App. 2014), *reh'g and/or transfer denied* (Jan. 27, 2015), *transfer denied* (Mar. 31, 2015) (internal citations and quotations omitted) (emphasis in original); *accord, Leuzinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 396 S.W.2d 570, 579 (Mo. banc 1965). Thus, "[a]n execution arising from a judgment against one spouse alone cannot affect property held by a husband and wife as tenants by the entireties." Pet. App. 10 n. 6 (citation omitted).

[5] For the Court's convenience examples of the two different guaranty forms Petitioners signed are included in this brief as Appendix A. App. A 1-16 (ROA A95-A97); App. A 17-36 (ROA A254-A256).

payment requires the payment of a debt immediately when due if the debtor fails to pay; a guaranty of collection, on the other hand, requires payment only after the lender first uses all legal means to collect payment from the debtor.").

B. PHC Defaulted On The Loans In 2012. CBR Sought To Collect From PHC, And From Petitioners On Their Guaranties.

In April 2012, after PHC failed to make required loan payments, CBR declared the loans in default, accelerated the amounts due, and demanded payment from PHC, from Petitioners and from the other guarantors. Pet. App. 2; ROA A1194-A1195.

Attempting to disavow their guaranties, Petitioners sued CBR, alleging for the first time that CBR "required" their guaranties solely because they were Gary Hawkins' and Chris Patterson's spouses. Petitioners thus claimed that CBR discriminated *against them* on the basis of their marital status in violation of the ECOA, 15 U.S.C. §1691(a), and Regulation B, 12 C.F.R. §202.7(d). Pet. App. 3; ROA A29-A30. Petitioners sought an unspecified amount of actual and punitive damages, equitable and declaratory relief that their guaranties were unenforceable, and an award of attorneys' fees. *Id.*

After Petitioners sued, CBR asserted a counterclaim for breach of their guaranties. ROA A45-A69; A933-A978. In response, Petitioners asserted CBR's alleged ECOA violation as an affirmative defense and right of set-off. A1311-A1312.

When Petitioners filed suit in federal court, a number of related persons and entities—including

PHC, Gary Hawkins, Chris Patterson, Patterson Raymore, and the Pattersons' operating company, Patterson Oil Co., Inc.—also sued CBR in Missouri state court, seeking to avoid liability on (1) the loans to PHC, (2) the guaranties of Gary Hawkins and Chris Patterson, and (3) the deeds of trust securing the loans. *See PHC Development, et al. v. Community Bank of Raymore,* No. 12CA-CV01896 (filed May 31, 2012) and *Patterson Oil Co., et al. v. Community Bank of Raymore,* No. 12CA-CV01932 (filed June 4, 2012). CBR filed counterclaims in those actions to recover on the loans and guaranties and to protect its rights under the deeds of trust.[6] PHC, Gary Hawkins and Chris Patterson have never asserted that CBR discriminated against them on the basis of marital status, nor have they ever brought claims against CBR for alleged ECOA violations.

C. The District Court Granted Summary Judgment To CBR After Concluding That, As Guarantors, Petitioners Are Not "Applicants" Under The ECOA And Were Not Entitled To Relief Under The ECOA.

In federal court, CBR moved for summary judgment on Petitioners' ECOA claim and affirmative defense. ROA A708-A929. The District Court granted judgment to CBR, concluding "Hawkins and Patterson were not 'applicants' within the meaning of the ECOA and

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[6] The state court case dockets can be accessed under their respective case numbers: 12CA-CV01896 and 12CA-CV01932, at https://www.courts.mo.gov/casenet/cases/searchDockets.do.

thus [CBR] had not violated the ECOA" in obtaining Petitioners' guaranties. Pet. App. 3, 22-23.[7]

Focusing on the express ECOA definition of "applicant" as "any person *who applies to a creditor directly for* an extension, renewal, or continuation of *credit,*" the District Court reasoned that "[a]n applicant is not akin to a guarantor," and that a "guarantor does not, by definition, apply for anything." Pet. App. 20, 22 (internal citations and quotations omitted) (emphasis in original). Noting that the purpose of the ECOA "is to eradicate credit discrimination waged against women whom creditors traditionally refused to grant credit," and that "the statute prohibits discrimination [against an applicant], such as denying credit or offering credit on less favorable terms," the District Court concluded

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[7] In their opening brief in this Court, Petitioners' frequently cite materials outside the record, apparently in an effort to address the *merits* of their ECOA claim, *i.e.*, their contention that CBR "required" their guaranties. In particular, Petitioners cite materials from a later-filed summary judgment motion, materials not part of the record here, including Doc. 70 (Defendant's Motion for Summary Judgment on Its Counterclaims for Breach of Guaranties & Plaintiffs' Affirmative Defenses) and Doc. 79 (Plaintiffs' Suggestions in Opposition to Defendant's Motion for Summary Judgment on Its Counterclaims for Breach of Guaranties & Plaintiffs' Affirmative Defenses). In the record before this Court, Petitioners offered no evidence that CBR "required" them to sign any of the guaranties (an allegation flatly contradicted by the express representations they repeatedly made in sixteen guaranties they signed over a five-year period), and the District Court did not address any such claim. Pet. App. 18; ROA A1189-A1195. In any event, any such assertion is an ECOA *merits* determination and irrelevant to the preliminary ECOA gateway question of who is an "applicant," the only question currently before the Court.

that "by sweeping guarantors into the statute, the regulation expands the ECOA beyond its intended purpose and leads to circular and illogical results in cases such as the present one, where a married woman is not being denied anything and is simply guaranteeing her spouse's business loan." *Id.* (citation omitted).

The District Court acknowledged that in 1985 the FRB redefined "applicant" in Regulation B to "extend the [ECOA] to guarantors of credit." *Id.* at 21. But applying the first step of *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the District Court, agreeing with Judge Posner's reasoning in *Moran Foods, Inc. v. Mid-Atlantic Market Dev. Co., LLC*, 476 F.3d 436, 441 (7th Cir. 2007), found that the statutory definition was clear: "there is nothing ambiguous about 'applicant' and no way to confuse an applicant with a guarantor." Pet. App. 22 (quoting *Moran*). The District Court thus did not defer to Regulation B, and instead held that Petitioners, as guarantors, are not "applicants" under the ECOA.[8]

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[8] Notably, the District Court also struck Petitioners' jury demand, finding that Petitioners "knowingly and voluntarily" agreed to waive their right to a jury trial when they signed their guaranties. Further, Petitioners repeatedly represented that they read, understood and agreed to the terms of their guaranties, that their guaranties fully reflected their intentions, and that they had the opportunity to discuss the same with their attorneys. The District Court would not "allow [Petitioners] to evade the agreed-upon waiver simply because they no longer wish[ed] to be bound by it." ROA A689-A691. On appeal, Petitioners did not challenge any of these findings or conclusions of the District Court. Brief of Appellants at 41-44.

D. The Eighth Circuit Affirmed The District Court, Holding That Guarantors Are Not "Applicants" Under The ECOA.

1. The Eighth Circuit Unanimously Concluded That An ECOA "Applicant" Does Not Include Guarantors.

After quoting the ECOA definition of "applicant," the Eighth Circuit observed that the FRB in 1985 by regulation defined "applicant" to include guarantors. Pet. App. 3. Noting that Petitioners *sole* argument for protection under the ECOA was that they qualified as "applicants" because they were guarantors of the loans to PHC, the Eighth Circuit zeroed in on the determinative question whether Petitioners are "applicants" under the ECOA. *Id.* at 4.

In that regard, the Eighth Circuit turned to the familiar *Chevron* analysis, pointing out that the first question is whether the intent of Congress is clear on the question at issue. Pet. App. 4. If the statute clearly answers the question, then that is the end of the matter. *Id.* Only if the statute is silent or ambiguous, would the Eighth Circuit proceed to the second question—whether the FRB's "interpretation" of the ECOA was permissible. *Id.* at 4-5.

The Eighth Circuit began and ended with the first step of *Chevron*, concluding that "the text of the ECOA clearly provides that a person does not qualify as an applicant under the statute solely by virtue of executing a guaranty to secure the debt of another. Pet. App. 6. To "qualify as an applicant under the ECOA, a person must 'appl[y] to a creditor directly for . . credit, or . indirectly by use of an existing credit plan for an

amount exceeding a previously established credit limit.'" *Id.* (quoting 15 U.S.C. §1691a(b)). Quoting Webster's Third New International Dictionary (2002) for the proposition that "to 'apply' means to make an appeal or request esp[ecially] formally and often in writing and usu[ally] for something to benefit oneself," *id.*, the Eighth Circuit observed that "the plain language of the ECOA unmistakably provides that a person is an applicant only if she requests credit." *Id.* In contrast, "a person does not, by executing a guaranty, request credit." *Id.*

Recognizing that a guaranty is legally quite different from the primary obligation on a loan, the Eighth Circuit emphasized that a "guaranty is collateral and secondary to the underlying loan transaction between the lender and the borrower." Pet. App. 6. In fact, "[w]hile a guarantor no doubt desires for a lender to extend credit to a borrower, it does not follow from the execution of a guaranty that a guarantor has requested credit. " *Id.* at 7. In a footnote, the Eighth Circuit pointedly observed that "we certainly do not view executing a guaranty as a *direct* request for credit," and Petitioners "have not argued" they qualify as "indirectly" requesting credit within the ECOA definition of "applicant." *Id.* at 7 n. 3 (emphasis in original).

Acknowledging the Sixth Circuit's decision in *RL BB Acquisitions, LLC v. Bridgemill Commons Dev. Group*, 754 F.3d 380 (2014), which found the ECOA definition of "applicant" to be ambiguous with respect to guarantors, the Eighth Circuit disagreed: "We find it to be unambiguous that assuming a secondary, contingent liability does not amount to a request for

credit." Pet. App. 7-8. Thus, the Eighth Circuit did "not defer to the Federal Reserve's [contrary] interpretation of applicant" under the ECOA, and instead concluded that a guarantor is not an ECOA "applicant." *Id.* at 9.

The Eighth Circuit then made three further observations in support of its holding that the ECOA definition of "applicant" does not include guarantors. *First*, the dominant purpose of the ECOA was to stop lenders from denying credit to women—particularly married women—on the basis of stereotypical assumptions that married women were not working, would be having children which would preclude them from working, and were always secondary to their husbands' economic and financial resources and power. Pet. App. 9. The Eighth Circuit emphasized that here, in stark contrast, "Hawkins and Patterson do not claim they were excluded from the lending process due to their marital status." *Id.* Instead, "they complain that they were improperly *included* in that process . . . ." *Id.* at 10 (emphasis in original).

Second, the Eighth Circuit emphasized that "Hawkins and Patterson do not argue that they qualify as applicants for *any* reason *other than* their status as guarantors." *Id.* (emphasis added). *Third*, in a footnote, the Eighth Circuit emphasized that, "under Missouri law, which governs the loans and guaranties in this case," spouses hold property in joint tenancy and thus "it likely was necessary for Hawkins and Patterson to execute their guaranties" because, otherwise, CBR would not be able to pursue any marital assets in the event of a default. *Id.* at n. 6. Indeed, given Missouri law, CBR had a "sound commercial practice unrelated to any stereotypical view of a wife's role" for obtaining

spousal guaranties in this situation. *Id.* (quoting *Moran Foods,* 476 F.3d at 442).

Thus, the Eighth Circuit concluded that "Hawkins and Patterson are not *applicants* under the ECOA." Pet. App. 10 (emphasis added).

2. Judge Colloton Identified Additional Reasons To Support The Eighth Circuit's Holding.

Judge Colloton concurred, offering further support for the Court's conclusion in three respects. *First*, he emphasized that the ECOA's definition of "applicant" should be interpreted based on the "ordinary meaning" of the phrase "to apply" as understood when the statute was enacted in 1974. Pet. App. 11. Citing and quoting Webster's Third New International Dictionary from 1971, Judge Colloton observed that "to make an application" usually means to apply for "something of benefit to oneself." *Id.* at 11-12. Thus, under the ECOA, an "applicant" is the "one who requests credit to benefit herself, not credit to benefit a third party." *Id.* at 12. Judge Colloton recognized that there might be "unusual meanings of 'apply,'" but emphasized that the "[a]nalysis under the first step of *Chevron* to determine whether the statutory text is unambiguous begins with ordinary meaning." *Id.*

Second, Judge Colloton considered additional factors, such as the context in which the ECOA was enacted, and other provisions of the statute. He pointed out that the statute often uses the "definite article"—in particular "the"—to refer to "*the* applicant," and such use of the definite article would not sit comfortably with Petitioners' arguments that "applicant" includes anyone and everyone who might in any way be

connected to the lending transaction. Pet. App. 12-13. Instead, "the statutory text confirms that the 'applicant' is the party to whom credit will be extended." *Id.* at 14.

Third, Judge Colloton addressed the FRB's expansive 1985 interpretation of "applicant" under the ECOA. He first pointed out that, in 1976, shortly after the ECOA's enactment and some initial amendments to the statute, "the Board specifically provided that 'a guarantor, surety, endorser, or similar party' is *not* an applicant." Pet. App. 14 (emphasis in original). He emphasized that the Board's 180-degree change in 1985 did not have anything to do with *interpreting* the ECOA's actual language but, instead, "apparently was motivated by [the Board's] dissatisfaction with Congress's decision to limit the cause of action under the ECOA to an *'aggrieved* applicant.'" *Id.* at 15 (emphasis in original).

Thus, he read the FRB's 1985 "redefinition of 'applicant' in 12 C.F.R. §202.2(e) to include 'guarantors'" as a measure "designed to give guarantors independent standing to sue." *Id.* But, as Judge Colloton pointedly observed, "[w]hatever might be the salutary effects of the change in policy, *it was not a choice for the Board to make*." *Id.* (emphasis added). To the contrary, "[a]ny decision to expand the civil liability of creditors and to provide a cause of action for guarantors must come from Congress." *Id.* at 16.

SUMMARY OF THE ARGUMENT

Ultimately, this is a straightforward statutory interpretation case, despite the efforts of Petitioners and the Government to obscure and evade the determinative legal issue. The Court's inquiry begins, and ends, with the language of the Equal Credit Opportunity Act's definition of "applicant." That gateway provision for the entire statutory scheme was defined with precision by Congress and determines both those who are protected from discrimination and those who have a right to sue in the event discrimination occurs.

Both Petitioners and the Government attempt to justify the FRB's purported expansion of the ECOA definition, though in different ways. Petitioners argue for an amorphous "zone of interests" approach to determine who *might*, as a policy matter, be considered an "applicant" in the abstract. That approach is utterly misguided given that the ECOA both creates an express cause of action *and* defines who is authorized to bring such an action. The Government fares little better by arguing that, because the ECOA may give the FRB a broad delegation of authority in *some* respects, such a delegation necessarily includes authority to redefine the statute's gateway definition of "applicant" under the guise of "interpreting" the statute.

Neither approach comes to grips with the precise and explicit definition of "applicant" in the statute, the overall structure of the statute, the particular problems Congress intended to address when it enacted the ECOA in 1974, or the dramatic expansion of potential liability for lenders that would result from Petitioners' and the Government's positions. Contrary to the

suggested approaches of Petitioners and the Government, this Court should begin and end its analysis with the plain and ordinary meaning of the statute's definition of "applicant," read in the context of the entire statute, and with regard for both the purposes behind the statute and the real world consequences of expanding the gateway that Congress very deliberately installed for the overall statutory scheme.

Critically, the ECOA definition of "applicant" is neither unclear nor subject to multiple plausible readings. That definition includes three critical words. In particular, the statutory definition limits applicants to those who "apply" to a lender "directly" for "credit." A guarantor, by definition, does not "apply" for "credit," and certainly does not do so "directly." Instead, a "borrower" does all of those things, seeking to obtain credit by applying directly to a lender, and the borrower does so for its own benefit. A guarantor, by contrast, is a secondarily-liable individual or entity, and neither "applies" for nor obtains "credit" for itself.

Furthermore, the ECOA uses the word "applicant" more than fifty times, suggesting a very deliberate choice of language by Congress. The ECOA also typically refers to "applicant" using the singular article ("the" applicant), further confirming that Congress envisioned and intended a limited class of "applicants," not a wide-ranging and virtually unlimited class of anyone and everyone who might in some way be connected to a lending transaction. Moreover, some ECOA sections referring to "the applicant" would make no sense if that term includes secondary parties such as guarantors. Lastly, the targeted and precise

remedies for violations, including the possibility of punitive damages, strongly suggest Congress did not intend that multiple individuals or entities be able to assert and recover on ECOA claims for a single lending transaction.

Limiting the ECOA definition of "applicant" to its plain terms will in no way frustrate or undermine the purposes of the ECOA. There will always be at least one "applicant" in *every* lending transaction, and that "applicant" can always assert an ECOA claim if a lender discriminates on a prohibited basis. No marital status or gender discrimination will be left without a remedy; the only question is who is entitled to bring the cause of action, and Congress answered that question by deciding the proper claimant is the "applicant."

Finally, no deference to the implementing agencies is due here. The statutory language is clear, and neither the FRB nor the Consumer Financial Protection Bureau ("CFPB") has ever suggested otherwise. Nor, at least until the Government filed its brief in this case, has either agency ever claimed that it was "interpreting" the ECOA when amending Regulation B. Instead, in 1985, the FRB candidly acknowledged that it was rewriting Regulation B to include guarantors *"because section 706 of the act confers standing to sue only upon an 'aggrieved applicant.'"* 50 Fed. Reg. 48,018, 48,020 (Nov. 20, 1985) (emphasis added).

In the end, there is no escaping the conclusion that the FRB, as it did in 1984 with regard to Regulation Y, has attempted to use Regulation B to redefine the gateway statutory provision of the ECOA. *Cf. Bd. of*

Governors of the Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361 (1986) (rejecting, as a matter of statutory interpretation, the FRB's amendments to Regulation Y to extend the Bank Holding Company Act's gateway definition of "bank" beyond the plainly stated statutory definition). Current Regulation B is not a permissible "interpretation" of the ECOA but, instead, is an *ultra vires* attempt "to decide—without any particular fidelity to the text—which policy goals [the FRB/CFPB] wishes to pursue." *Michigan v. EPA*, 576 U.S. ___, 135 S. Ct. ___, ___ (2015) (Thomas, J., concurring).

ARGUMENT

I. The ECOA's Explicit Statutory Definition Of "Applicant" As One Who "Applies" For "Credit" "Directly" Does Not Include Guarantors.

This case begins and ends with the ECOA itself. This Court's *Chevron* analysis has at least two distinct steps: *first*, the Court inquires whether the statutory provision at issue speaks to and resolves the question at issue; if so, the implementing agency has no authority to construe the statute in a way inconsistent with the statutory text Congress enacted. Only if the statutory language is silent or ambiguous with respect to the question does the Court reach the *second* step—determining whether the agency has adopted a "permissible" interpretation of the statute.[9]

Petitioners here ignore the *Chevron* analysis altogether, instead going down a rabbit hole chasing a statutory "zone of interests" analysis that is neither

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[9] This may not be one of those "extraordinary cases," *King v. Burwell*, 576 U.S. ___, 135 S.Ct. ___, ___ (2015), in which the *Chevron* analysis does not apply at all, although an argument can be made that, under "*Chevron* Step Zero," this is a case where *no* deference to the agency is warranted because the agency is purporting to redefine the statutorily-defined gateway provision for an entire statutory scheme, *i.e.*, who qualifies as an "applicant" to invoke the protections, cause of action, and remedies of the ECOA? Ultimately, however, Respondent's position is that it makes no difference whether "*Chevron* Step Zero" is implicated in this case; the result is the same in either event, because the FRB's 1985 amendment to Regulation B to include "guarantors" as ECOA "applicants" cannot be squared with the ECOA's precise statutory definition of "applicant."

applicable nor appropriate where Congress has created an *express* statutory cause of action and *defined* who is entitled to bring such an action. Petitioners misguidedly attempt to rely on either implied right of action cases (notwithstanding that the ECOA expressly creates a right of action), or cases involving statutory rights of action that do not define those authorized to bring a claim (the ECOA, in contrast, specifically defines those authorized to bring a claim, *i.e.*, "applicants").

Notably, the Government goes nowhere near Petitioners' approach, even though the Government supports the ultimate outcome Petitioners seek. Instead, the Government urges the Court to flip the *Chevron* analysis on its head, and start with a premise that "great deference" must be given to the implementing agency's "interpretation" of the ECOA. The Government interestingly attempts to lead the Court straight to a "deference-to-the-agency" argument while urging the Court to ignore altogether the express language and the overall structure of the ECOA.

The Court should see through these efforts to obscure and evade the central, straightforward issue in this case. The first step of the Court's traditional *Chevron* analysis is the determinative one here: Does the ECOA's explicit statutory definition of "applicant"—one who "applies" for "credit" "directly"—include a "guarantor"?[10] Put another way,

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[10] The Eighth Circuit observed that Petitioners "have not argued" they qualify as "indirectly" requesting credit within the ECOA definition of "applicant." Pet. App. at 7 n. 3. Thus, Respondent's argument focuses on the "applies" for credit "directly" language in

giving the words of the ECOA their ordinary meaning and considering the statute as a whole, does "applicant"—explicitly and carefully defined as one who "applies" for "credit" "directly"—exclude from its scope guarantors, *i.e.*, those who may support another's application for credit but who are not seeking credit for themselves?

The simple and irrefutable answer is that the ECOA is clear and excludes guarantors, because guarantors do not "appl[y]" for "credit" "directly." Thus, the FRB's contrary Regulation B is not a permissible "interpretation" of the ECOA but, instead, an *ultra vires* effort to redefine the statutory provision. As a result, the Court should never reach the second step of the *Chevron* analysis.

A. The Proper And Straightforward Inquiry Is To Analyze The Statute Itself. The Petitioners Miss The Mark In Focusing On A "Zone Of Interests" Inquiry When The ECOA Expressly Creates A Private Right Of Action And Defines The "Applicant" Entitled To Bring Suit. The Government Attempts To Flip *Chevron* On Its Head, Starting With Deference To The Implementing Agency, Not The ECOA's Plain And Ordinary Meaning.

This Court must first determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. In making that

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the ECOA, because that is the only part of the definition at issue here.

determination, the Court decides whether "the statutory text is plain and unambiguous. If it is, we must apply the statute according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009); *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). In such a case, statutory interpretation "is the end of the matter." *Chevron*, 467 U.S. at 842. Only if "Congress has not directly addressed the precise question at issue" may the Court consider "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

Chevron dictates that "agencies must operate 'within the bounds of reasonable interpretation,'" *Utility Air Regulatory Group v. EPA*, 573 U.S. ___, 134 S.Ct. 2427, 2442 (2014), "[a]nd reasonable statutory interpretation must account for both 'the specific context in which . language is used' and 'the broader context of the statute as a whole.'" *Id.* (internal citations omitted). "Thus, an agency interpretation that is 'inconsistent with the design and structure of the statute as a whole,' does not merit deference." *Id.* (internal citations omitted). The Court has emphasized that an "agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies exercise discretion only in the interstices created by statutory silence or ambiguity. " *Id.* at 2445. Agencies "must always 'give effect to the unambiguously expressed intent of Congress.'" *Id.*

Here, the Court cannot accept the Government's invitation to simply skip the first step of *Chevron*. If, as the Eighth Circuit concluded and Respondent agrees, the FRB did not "interpret" the ECOA but, instead,

attempted to redefine the statutory "applicant" provision through Regulation B, then necessarily Regulation B is not a *permissible* "interpretation" of the ECOA. Thus, the first and determinative question in this case is whether the explicit and precise ECOA definition of "applicant" is plain and unambiguous, when given its ordinary meaning and considered in the context of the entire statute. If so, the Court must enforce the ECOA as written, not as an agency many years later decided it wished the ECOA had been written.

In deciding whether "applicant" as defined in the ECOA includes a guarantor, the Court must consider the language of the relevant statutory provisions, the overall structure and purposes of the ECOA, and the context in which the ECOA was enacted in 1974. Considering those essential factors leads to the inescapable conclusion that the ECOA plainly and unambiguously excludes "guarantors" from the statutory definition of "applicant."

B. The ECOA's Definition Of "Applicant" As One Who *Applies Directly* For *Credit* Excludes "Guarantors."

When "interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992). Thus, "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* at 254 (quoting *Rubin v. United States*, 449 U.S. 434, 430 (1981)). Put another way, the

"inquiry ceases 'if the statutory language is unambiguous and the statutory scheme is coherent and consistent.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002); *see also Hartford Underwriters, Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("when 'the statute's language is plain, the sole function of the courts' – at least where the disposition required by the text is not absurd – 'is to enforce it according to its terms.'"); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) ("when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished").

Here, the plain and ordinary meaning of "applicant" in the ECOA—one who "applies" "directly" for "credit"—excludes "guarantors" from the statute's scope. The Court does not go on a search for unusual or idiosyncratic meanings of the terms a statute uses. Instead, "[i]t is axiomatic that the statutory definition of the term excludes unstated meanings of that term." *Meese v. Keene*, 481 U.S. 465, 484-485 (1987). Thus, the Court long has emphasized that, "[a]s a rule, '[a] definition which declares what a term 'means' excludes any meaning that is not stated." *Burgess v. United States*, 553 U.S. 124, 130 (2008) (quoting *Colautti v. Franklin*, 439 U.S. 379, 392-393 n. 10 (1979)).

The Government's invitation to instead start with a presumption of "great deference" to the agency and search for any possible ambiguity to justify the agency's counter-statutory "interpretation" of the ECOA's plain and ordinary meaning is exactly backwards. Interpreting statutes is not an exercise in

speculating about "the outer limits of [a word's] definitional possibilities." *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006). Instead, "[a]mbiguity is a creature not of definitional possibilities but of statutory context," *Brown v. Gardner*, 513 U.S. 115, 118 (1994), and the ECOA definition of "applicant" is neither vague on its face nor ambiguous in the greater context of the ECOA as a whole.

1. The Plain And Ordinary Meaning Of The ECOA Definition Of "Applicant" Excludes Guarantors Of Loan Transactions.

In the ECOA, Congress specifically defined the "applicant" who is both protected from discrimination and authorized to bring a claim under the statute's express cause of action. Critically, Congress utilized two key words that it did not otherwise define in the ECOA: an *applicant* is one who "applies" for credit "directly." 15 U.S.C. §1691a(b). Interpreting these two key words—"applies" and "directly"—is a straightforward analysis, one in which this Court often has turned to dictionaries for assistance in ascertaining the plain and ordinary meaning of statutory terms not otherwise defined by Congress.

During the time period leading up to the enactment of the ECOA and immediately following the statute's enactment and amendment in 1976,[11] Webster's Third New International Dictionary consistently defined "apply" as follows:

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[11] The Court has observed that "the most relevant time for determining a statutory term's meaning" is the time period when it "became law." *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 228 (1994).

> to make an appeal or a request esp. formally and often in writing and usu. for something *of benefit to oneself* (~ to an employer for a job) (~ *to a bank for a loan*).

See p. 105 (definition of "apply") in 1965, 1973, and 1981 editions (emphasis added). Legal dictionaries effectively define "apply" in the same fashion as Webster's. For example, Black's Law Dictionary defines "apply" as "[t]o make a formal request or motion (*apply for a loan*)." *Black's*, at 120 (10th ed. 2014) (Bryan A. Garner, ed.) (emphasis added). Ballentine's Law Dictionary defines "apply" as "[a] request; a seeking, usually in the form of writing." *Ballentine's*, at 84 (3d ed. 1969).

"Directly," though having more possible meanings and usages than "apply," commonly is defined as "without any intervening space or time," or "without any intervening agency or instrumentality or determining influence," and even "FACE-TO-FACE: in person." *Webster's*, at 641. Certainly, the borrower-applicant is the individual or entity that "applies" "directly" for "credit,"[12] not a guarantor, as Webster's pointedly illustrates by using "apply to a bank for a loan" as a paradigmatic example of usage.

Thus, giving the critical, undefined words of the ECOA—"applies" and "directly"—their plain and

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[12] The word "credit" is defined in the ECOA as "the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment. . . ." 15 U.S.C. § 1691a(d). This definition is fully consistent with common usage, and also makes clear that guarantors are not applicants for "credit," as further discussed in this brief at pp. 26-27.

ordinary meaning permits only one conclusion, and that conclusion resolves this case: a guarantor neither "applies" for credit nor seeks anything "directly" from the lender. Thus, a "guarantor" cannot qualify as an "applicant" under the ECOA. Instead, the plain statutory language precludes the FRB (and now the CFPB) from "interpreting" the ECOA to include guarantors.

Petitioners cannot evade the plain statutory language by invoking a misguided "zone of interests" test that applies only in implied right of action situations or under statutes that create an express cause of action but fail to define those authorized to bring a claim. Neither of those circumstances is present here.[13] Instead, the ECOA expressly creates a cause of action and specifically defines who is authorized to bring a claim.

Nor can the Government dodge the import of the plain statutory text by flipping the *Chevron* analysis on its head and trying to start with the inquiry whether, as a policy matter, it might be valid to include "guarantors" within the ECOA's scope. The Government may be correct that the ECOA gave the FRB broad authority to implement the ECOA in *some* respects, but Congress did not give the agency *carte blanche* in *all* respects. In particular, the Government

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[13] Furthermore, Petitioners have waived any statutory standing / zone of interest argument because they never made such an argument in either the District Court or the Eighth Circuit. *See generally*, ROA A1183-A1211; Brief of Appellants; Reply Brief of Appellants. *City & Cnty. of San Francisco, Calif. v. Sheehan*, 575 U.S. ___, 135 S.Ct. 1765, 1773 (2015) ("The Court does not ordinarily decide questions that were not passed on below.").

is flat out wrong that the ECOA gave the agency *any* power to *redefine* the ECOA's explicit statutory definition of "applicant," the gateway provision for the entire statute.

In the financial world and as a legal matter, an "applicant," *i.e.*, a "borrower," simply cannot be equated with or mistaken for a "guarantor." Instead, "guarantor" has a well-established meaning in the law, and a "guarantor" is not a "borrower" or "debtor," all of which Congress is presumed to have recognized when it enacted the ECOA. In fact, Congress defined "credit" in the ECOA as "the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer payment. " 15 U.S.C. §1691a(d). That definition only covers an "applicant," *i.e.*, a borrower who obtains credit and becomes a "debtor"; it cannot include a "guarantor" who has obtained no right to "defer payment of debt" from a creditor or "to incur debts and defer payment."[14]

Furthermore, legal authorities make clear that "a guaranty is an undertaking by a guarantor to answer for payment of some debt, or performance of some contract, *of another person* in the event of default." 38 Am.Jur.2d *Guaranty* §1 (2015) (emphasis added). By definition, a "guarantor" holds a different legal status

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[14] Petitioners' citation to UCC-cases under R.S.Mo. §400.9-504(3) is disingenuous. That section, titled "Secured party's right to dispose of collateral *after default*—effect of disposition," by its express terms only applies after the borrower has defaulted and the guarantor's liability is no longer contingent. *Id.* (emphasis added). That a guarantor becomes a debtor after default, however, does not change the fact a guarantor never receives the right to *defer* payment.

than a borrower or debtor: "[a] guaranty is, by its very nature, a conditional promise to pay because the guarantor promises to pay only on the condition that the principal debtor fails to pay and is immediately enforceable if that event occurs." *Id.*; *accord* 38A C.J.S. *Guaranty* §122 (2015) ("[T]he obligations of the guarantor are not predicated on the debt, but upon the contract expressed in the guaranty and the potential collateral liability undertaken by a guarantor flows from the independent written guaranty agreement."). Indeed, Petitioners here explicitly recognized this distinction in their guaranties, stating: "I acknowledge that you [CBR] are relying on this Guaranty in extending credit *to the Borrower* [PHC]. " App. A. 12 (emphasis added).[15]

In fact, until the FRB amended Regulation B in 1985 to purportedly redefine the ECOA "applicant" provision, *no* court had ever held or even suggested that the ECOA's statutory definition included guarantors or other secondarily-liable parties to a lending transaction. Quite the contrary, the lower courts followed the plain and ordinary meaning of the statutory definition. *See, e.g.*, *Anderson v. United Finance Company*, 666 F.2d 1274, 1277-1278 (9th Cir. 1982) (allowing award of punitive damages and attorney's fees solely to the woman who, as the "applicant," was required to provide her husband's signature on loan documents); *Bank of America Nat. Trust & Sav. Ass'n v. Hotel Rittenhouse Associates*, 595 F.Supp. 800 (E.D. Pa. 1984) (neither husband nor wife

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[15] Petitioners admitted in both the District Court and the Eighth Circuit that, prior to default by PHC, they had only a contingent liability to CBR. *See, e.g.*, ROA A1206; Brief of Appellants at 39.

who signed guaranties in support of application by business entity could bring ECOA claims because it "was the entity which applied for and received credit," and the statutory definition excludes guarantors); *Morse v. Mut. Federal Sav. & Loan Ass'n*, 536 F.Supp. 1271, 1278 (D. Mass. 1982) (claim by spouse who signed guaranty was "a total misconception" because she was "implicitly excluded from the statutory definition" [of "applicant"] and "the affront was not to her, but to [her husband], who was unable to secure 'credit' without the signature of his wife"); *Delta Diversified, Inc. v. Citizens & Southern Nat. Bank*, 320 S.E.2d 767, 771 (Ga. Ct. App. 1984) (spouses who signed guaranties "were not 'applicants' as defined by" the ECOA).

Ultimately, after even a cursory, much less a careful, analysis of the ECOA's deliberately chosen language defining "applicant," there is only one plausible conclusion. As the Seventh Circuit aptly put it, "there is nothing ambiguous about 'applicant' and no way to confuse an applicant with a guarantor." *Moran*, 476 F.3d at 441. "In sum, the text and reasonable inferences from it give a clear answer against the Government, and that, as we have said, is 'the end of the matter.'" *Brown*, 513 U.S. at 120 (quoting *Chevron*).

2. The Overall Structure Of The ECOA And Numerous Other Provisions In The Statute Confirm That A Guarantor Is Not An "Applicant."

It is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is

used." *Deal v. United States*, 508 U.S. 129, 132 (1993). Further, the Court "must read the words 'in their context and with a view to their place in the overall statutory scheme.'" *King*, 135 S.Ct. at ___ (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). Doing so here leads the Court to the same inexorable conclusion that results from focusing on the language of the ECOA definition of "applicant." The context here is that the word "applicant" appears in the ECOA over 50 times. The ECOA uses the term "debtor" only rarely, and then only in the context either of defining "credit," 15 U.S.C. §1691a(d), or in a circumstance where it is clear that the loan already has been made, making the "applicant" a "debtor," *i.e.*, one who has received credit. *E.g.*, 15 U.S.C. § 1691a(d) (defining "credit").

Never does the ECOA refer to a "guarantor" or any other such secondarily-liable parties to a loan transaction. If Congress intended the ECOA to apply as broadly as Petitioners and the Government now suggest, Congress easily could have accomplished that result. For example, Congress could have provided that the ECOA prohibits discrimination against any "person" rather than just "applicants," 15 U.S.C. §1691(a), and Congress could have created a cause of action for any "aggrieved person" instead of an "aggrieved applicant." *Id.* §§ 1691e(a), (b), (c). But Congress did not do that; instead, Congress repeatedly (more than 50 times) used the word "applicant" in the ECOA. Further, Congress carefully and specifically defined that term in the statute, prohibited discrimination only against "applicants," and created a civil cause of action only in favor of the "aggrieved applicant."

In almost every instance, the ECOA refers to *the* applicant, a notable and consistent use of the singular article, not a plural article as one would expect if the term encompassed all persons or entities connected in any way to a lending transaction. In fact, the ECOA contemplates that there often, if not usually, will be a single applicant-borrower, and the ECOA both protects that individual or entity from discrimination and gives the applicant an express statutory cause of action (including possible damages, and declaratory and equitable relief) if a lender discriminates against it on a prohibited basis. That is the most natural reading of the ECOA scheme, and such a reading makes perfect sense.

Take the hypothetical Petitioners repeatedly raise: Suppose an LLC owned by two minority women seeks a loan, but the lender denies the LLC's application, or grants it but charges a higher interest rate, because the owners are minority women. That would be an ECOA violation, and the LLC (as the "applicant" for credit) would have a statutory cause of action for prohibited discrimination. Further, the LLC could recover any actual damages it could prove, an award of attorney's fees, and possibly punitive damages up to $10,000. That result fully serves the ECOA's purposes.

No prohibited discrimination is beyond redress if "applicant" is given its plain and ordinary meaning. There will always be an "applicant," *i.e.*, a borrower or prospective borrower, in the lending context, and that applicant can bring a claim under the ECOA against a lender that discriminates against the applicant-borrower on any of the prohibited bases, including marital status, irrespective of whether the married or

single person that motivates the lender's actions is the actual "applicant." *Cf. Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006) (company that entered contract with Domino's could assert race bias claim under 42 U.S.C. §1981, but the sole shareholder of the company—an African-American—could not do so). Apparently, Petitioners and the Government instead want *anyone* in any way connected to a lending transaction to partake in the statutory cause of action. But that result is not supported by the statutory definition of "applicant" or the overall structure and provisions of the ECOA. *Cf. McDonald*, *supra* at 479 ("Trying to make [the statute] a cure-all not only goes beyond any expression of congressional intent but would produce satellite litigation of immense scope.").

Several times the ECOA uses "applicant" in a context that only makes sense if the individual or entity applying for credit directly is the "applicant." For instance, with respect to the creditor giving "notice" of the reasons for a denial of credit, the statute says that each "applicant" is entitled to such notice. 15 U.S.C. §1691(d)(2). The statute then goes on to state that when "a creditor has been requested by a third party to make" an extension of credit "to an applicant," the notice requirement can be satisfied by providing notice either to the applicant "or indirectly through the third party." *Id.* at (d)(4). Such a provision for "indirect" notice to a "third party" makes no sense if every individual or entity connected to the loan in some fashion is already considered an "applicant" who has sought credit "directly" from the lender.

Similarly, when the ECOA identifies "Civil Liability" for violations of the Act, it pointedly declares that a creditor "shall be liable to *the* aggrieved applicant for any actual damages," and "to *the* aggrieved applicant for punitive damages in an amount not greater than $10,000...." 15 U.S.C. §§ 1691e(a), (b) (emphasis added). These provisions on their face contemplate a single, aggrieved "applicant," as a general matter, not multiple "applicants" as a matter of course.

Furthermore, under Petitioners' and the Government's view, a creditor could be liable for punitive damages up to $10,000 to each and every individual or entity connected to a loan transaction. But there is no indication in the statute or its legislative history that Congress intended to authorize multiple punishments (or lawsuits or attorney fee awards) for a single loan made or denied in violation of the ECOA. "Where a statute names the parties granted [the] right to invoke its provisions, such parties only may act." *Hartford Underwriters*, 530 U.S. at 6-7 (quoting 2A N. Singer, *Sutherland on Statutory Construction* §47.23, p. 217 (5th ed. 1992)).[16]

Current Regulation B, however, necessarily opens the door to multiple damage claims for a single lending transaction by authorizing claims to be brought by multiple non-applicants, parties whom Congress never

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[16] All banks and lending institutions, including CBR, are subject to regulatory supervision and are frequently examined by state and/or federal regulators, including, the FRB, the FDIC and/or the OCC and, in Missouri, the Missouri Division of Finance. The federal examiners all have administrative enforcement powers under the ECOA. 15 U.S.C. §1691c.

authorized to invoke the ECOA and its remedies. Such a result would fly in the face of the ECOA's plain language, the overwhelming focus of the ECOA on the "applicant," the statute's overall structure, and Congress' precise efforts to tailor rather than leave open-ended the remedies available under the express statutory cause of action.

3. The Context In Which Congress Enacted The ECOA In 1974 And Subsequent Amendments Confirm That Congress Purposely Crafted A Precise Definition Of "Applicant."

There is no dispute about the origins of the ECOA and its primary purpose of protecting women from discrimination with respect to obtaining credit. The Congress that enacted the ECOA conducted hearings and considered extensive evidence regarding the difficulties women in general—single, married, separated, divorced and widowed—encountered in seeking and obtaining credit. After extensive hearings, the Senate found there was "widespread discrimination on the basis of sex and marital status in the granting of credit to women." S. Rep. No. 278, 93rd Cong., 1st Sess. 16 (1973) ("Sen. Rep. 93-278"). In particular, the Senate identified several categories of discrimination:

> 1. Single women have more trouble obtaining credit, especially mortgage credit, than single men.
>
> 2. Creditors generally require a woman who has credit to reapply for credit when she marries, usually in her husband's name. Similar reapplication is not asked of men when they marry.

> 3. Creditors are often unwilling to extend credit to a married woman in her own name.
>
> 4. Women who are divorced or widowed have trouble reestablishing credit. Women who are separated have a particularly difficult time since their accounts may still be in the husband's name.
>
> 5. Creditors are often unwilling to count the wife's income when a married couple applies for credit.

Id. The Senate emphasized, however, that it was "this kind of discrimination, not the right of banks to insure their loans," *id.* at 18, that the Senate was enacting the ECOA to address. Further, it was "not the purpose of [the ECOA] to require any creditor or card issuer to extend credit to any person when such person is not deemed creditworthy." *Id.* at 20.

Subsequent hearings in the House essentially echoed the Senate process,[17] and resulted in a very short House Report that adds little to the more extensive Senate Report. Nowhere in the legislative history is there any discussion or suggestion that the express definition of "applicant" includes, or should include, third parties such as guarantors. Instead, the legislative history makes clear that Congress was equating "the applicant" with "the borrower," not the

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[17] Part of the record before the House was a law review article on this topic. *See* Margaret J. Gates, *Credit Discrimination Against Women: Causes and Solutions*, 27 Vand. L. Rev. 363 (1974).

much broader notions now being urged by Petitioners and the Government.[18]

What is clear from the ECOA's legislative history, as well as the statutory statement of purposes and findings, is that Congress intended that women—whether single, married, separated, divorced, or widowed—be treated equally to men in seeking, accessing, obtaining, holding and renewing credit. Ironically, of course, Petitioners are complaining precisely because they were *included* in the credit process and treated as the financial equals of their husbands, not because they were excluded, or because their husbands would have faced different rules if Petitioners had been the borrowers.

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[18] *See, e.g., Credit Discrimination: Hearings Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 93rd Cong., 2d Sess. 89 (1974) (Statement of Bernard V. Parrett, Acting General Counsel, Dept. of Commerce; using "credit applicant" and "borrower" interchangeably); *id.* at 33 (Statement of Jeffrey M. Bucher, Member, Board of Governors of the Fed. Reserve System; referring to the "interests of borrowers"); *id.* at 126 (Statements by Congressman Stewart B. McKinney, Connecticut; referring to the "borrower" and "prospective borrower"); *To Amend the Equal Credit Opportunity Act of 1974: Hearings Before the Subcomm. on Consumer Affairs of the of the House Comm. on Banking and Currency*, 93rd Cong., 1st Sess. 10-12, 69 (1975) (Statements by Congressman Frank Annuzio, Chairman; referring to the "borrower" and "discrimination against a borrower"); *id.* at 17 (Statement of Stephen S. Gardner, Deputy Secretary of the Treasury; referring to the "would be borrower" and the "prospective borrower"); H. Rep. No. 210, 94th Cong., 1st Sess. 4, 6 (1975) ("H. Rep. 94-210") (General Comments; referring to the "potential borrower," "borrower" and "applicant" interchangeably). Nothing in the ECOA's legislative history evidences any intent by Congress to protect guarantors or other secondarily-liable parties.

The Seventh Circuit recognized "it is apparent that what the Act was intended to do was forbid a creditor to deny credit to a woman on the basis of a belief that she would not be a good credit risk because she would be distracted by child care or some other stereotypically female responsibility." *Moran Foods*, 476 F.3d at 441. Other Circuits have agreed after reviewing the legislative history. As the Ninth Circuit put it, "[t]he purpose of the ECOA is to eradicate credit discrimination waged against women, especially married women whom creditors traditionally refused to consider for individual credit." *Anderson*, 666 F.2d at 1277; *see also Mayes v. Chrysler Credit Corp.*, 37 F.3d 9, 11 (1st Cir. 1994) ("The statute was initially designed, at least in part, to curtail the practice of creditors who refused to grant a wife's credit application without a guaranty from her husband."); *Midkiff v. Adams*, 409 F.3d 758, 771 (6th Cir. 2005) (quoting and citing *Mayes* and *Anderson*).

To include guarantors such as Petitioners within the scope of the ECOA would fly in the face of the original reasons for enacting the statute. The ECOA is about equality, and that is exactly the treatment Petitioners received here—equal financial stature and responsibility as their husbands. The ECOA definition of "applicant" has remained unchanged in the statute since first enacted in 1974. There is no discussion of that definition in the legislative history of subsequent amendments to the ECOA in 1976, 1988, or 2010. Thus, the overriding original purpose of the ECOA is yet another reason to interpret the statute's unchanged definition of "applicant" to exclude guarantors.

4. Expanding The ECOA Definition Of "Applicant" To Include Guarantors Would Open Unintended "Vistas Of Liability" Under The Statute.

The Government urges the Court to ignore any question of remedies available for ECOA violations in determining whether the statutory definition of "applicant" is ambiguous, U.S. Br. at 34-35, but such an approach would ignore statutory context and structure, as well as legislative history and common sense. Instead, the statutory remedies the ECOA creates, and Congress' concern about not imposing ruinous liability on lenders for ECOA violations (which often, even if they occur, will not result in any significant harm, if any harm at all), counsel strongly in favor of taking the statutory remedies into account when interpreting the ECOA definition of "applicant."[19] Those concerns also counsel in favor of considering the dramatic expansion of ECOA liability that would potentially occur if the Court permits the Government through Regulation B to "interpret" the statute to include guarantors and others who may be connected in some fashion to a lending transaction.

The Seventh Circuit honed in on this very issue when it rejected the position the Government takes here. In *Moran Foods*, the Seventh Circuit observed that, "to interpret 'applicant' as embracing 'guarantor'

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[19] While the comprehensive remedial scheme Congress enacted in favor of aggrieved applicants under §1691e is pertinent to the question presented, Respondent agrees with the Government that the Court need not resolve any particular remedies questions in order to decide the question presented.

opens vistas of liability that the Congress that enacted the Act would have been unlikely to accept." 476 F.3d, at 441. As the Seventh Circuit explained, as a general rule "the damages will be modest" if an applicant is "denied credit, or given credit but charged a higher interest rate. " *Id.* A situation in which a failure to obtain credit from one lender who violated the ECOA resulted in the loss of "a tremendous business opportunity," would be "rare and difficult to prove." *Id.*

Instead, damages in the typical case "will be limited to the cost of the higher interest, or the inconvenience of arranging alternative credit. " or other minimal financial consequences. 476 F.3d, at 436. But the liability exposure of a lender for allegedly violating the ECOA with respect to a guarantor is potentially massive. A violation of the ECOA in that context could have the result—precisely the result Petitioners seek here—of making the guaranty "unenforceable" so that the creditor would "lose the entire debt." *Id.*

Here, if CBR violated the ECOA with respect to PHC (by engaging in marital status discrimination), then PHC could have brought a claim under the ECOA seeking its actual damages, any appropriate declaratory or equitable relief, and potentially up to $10,000 in punitive damages.[20] That is the "vista of liability" Congress envisioned and intended in cases

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[20] CBR is a small community bank, with only $16 million in capital. Losing a $2 million debt would be a substantial loss for CBR, just as it would for thousands of other small community banks across the country. *See* CBR's March 31, 2015 Call Report filed with the FDIC, which is a matter of public record and can be found through a name search at https://cdr.ffiec.gov/public/ManageFacsimiles.aspx.

such as this one, not the extreme and harsh result Petitioners seek.

C. The FRB's (And Now CFPB's) Current Regulation B Definition Of "Applicant" Cannot Be Squared With The ECOA Definition, A Fact The FRB Candidly Acknowledged In 1985.

1. The Original Regulation B Adopted In 1975 Tracked The ECOA Definition Of "Applicant."

When it first adopted Regulation B in 1975, the FRB saw no ambiguity in the statutory definition of "applicant." Indeed, the original Regulation B tracked the carefully crafted statutory definition. Because the ECOA covers the applicant prior to an extension of credit and the applicant *qua* debtor after an extension of credit, the FRB interpreted "applicant" as follows:

> Applicant means any person who applies to a creditor directly for an extension, renewal or continuation of credit, or who applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit. With respect to any creditor the term also includes any person to whom credit is or has been extended by that creditor.

40 Fed. Reg. 49,298, 49,306 (Oct. 27, 1975); *see also id.* at 49,298 (the expanded definition was intended to "embrace[] two terms used by Congress in the Act, 'applicant' and 'debtor' [t]o simplify [the] terminology").

2. After The 1976 ECOA Amendments, The FRB Amended Regulation B To Expressly *Exclude* "Guarantors."

Following the 1976 amendments to the ECOA, which did not change the statutory definition of "applicant," the FRB proposed that it might amend Regulation B to include additional parties such as guarantors, 41 Fed. Reg. 29,870, 29,871, 29,878 (July 20, 1976), but quickly reversed course.[21] 41 Fed. Reg. 49, 123, 49,124, 49,132 (Nov. 8, 1976). Instead, to "resolve confusion regarding the scope of ['applicant']" potentially created by the FRB's proposed amendments, *id.* at 49,124, the FRB amended Regulation B to *expressly* provide that "applicant" did *not* include a guarantor, surety, endorser or other similar party:

> Applicant means any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may be contractually liable regarding an extension of credit *other than a guarantor, surety, endorser or similar party*.

42 Fed. Reg. 1242, 1252 (Jan. 6, 1977) (emphasis added).

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[21] Notably, the FRB never expressed doubt or uncertainty about the plain and ordinary meaning of "applicant"; instead, the FRB throughout the 1976 amendment process referred to a guarantor as a "nonapplicant," 41 Fed. Reg. 29,874, or an "additional party." 42 Fed. Reg. 1256.

3. In 1985, The FRB Did An About-Face And Amended Regulation B To *Include* Guarantors, Even While Explicitly Acknowledging That A "Guarantor" Is Not An "Applicant" Under The ECOA Itself.

For the better part of a decade after the ECOA was enacted, consistent with Congress' express intent "that the essential prohibition in [the] legislation is directed at discrimination *against applicants*," S. Rep. No. 589, 94th Cong., 2nd Sess. 3 (1976) ("Sen Rep. 94-589") (emphasis added), the FRB followed the statutory definition of "applicant," and expressly recognized that the ECOA only prohibits discrimination against the credit *applicant* (*i.e.*, the borrower). In 1985, however, after apparently becoming dissatisfied with Congress' definition of "applicant," the FRB decided to redefine that term in Regulation B to include guarantors, a 180-degree turn from the position the FRB adopted in both 1975 and 1976.

The FRB made no pretense that its about-face was a result of "interpreting" or "clarifying" an ambiguous term. Rather, the FRB candidly acknowledged that a guarantor or similar party is *not* an "applicant" under the statutory definition; in fact, the FRB effectively declared that it was amending Regulation B to redefine "applicant" as Congress defined that gateway term in the ECOA, and that it was doing so for the express purpose of *creating a new class* of persons entitled to sue for alleged violations of the ECOA. 50 Fed. Reg. 48,018, 48,020, 48,025 (Nov. 20, 1985) ("If a creditor violates [12 C.F.R. §202.7(d)] a guarantor whose signature has been illegally required has no legal remedy *because section 706 of the [A]ct confers standing*

to sue only upon an "aggrieved applicant.") (emphasis added).

Thus, the FRB proposed "a substantive change to the definition of 'applicant,'" in particular "to revise the definition of 'applicant' [in Regulation B] to include guarantors, sureties, endorsers, and similar parties." 50 Fed. Reg. 10,890, 10,891 (Mar. 18, 1985). Numerous interested parties provided comment on the proposed change, and many pointed out that the proposed change expanded the statutory definition. Nonetheless, the FRB "made changes in the definition of 'applicant' to give guarantors legal standing to sue in the courts when there is an alleged violation of the signature provisions of the act or the regulation." 50 Fed. Reg. 48,018. The FRB itself reiterated that it was making "a substantive change to the definition of 'applicant'. " *Id.* at 48,020. Most notably, however, the FRB acknowledged it was attempting to redefine the statutory definition:

> If a creditor violates this provision, however, a guarantor whose signature has been illegally required currently has no legal remedy *because section 706 of the act confers standing to sue only upon an "aggrieved applicant."* The Board has included guarantors and similar parties within the definition of "applicant" to resolve this question of standing.

50 Fed. Reg. 48,020. (emphasis added); *id.* at 48,025 (describing the 1985 amendment as a "[r]edefinition of 'applicant' to include guarantors[,]" and acknowledging that under the ECOA, only "an applicant for credit has standing to sue but a guarantor does not.").

Ultimately, the FRB redefined "applicant" in §202.2(e) in 1985 to provide:

> Applicant means any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of credit. *For purposes of §202.7(d), the term includes guarantors, sureties, endorsers and similar parties.*

50 Fed. Reg. 48,027 (emphasis added). *See* 12 C.F.R. §202.2(e).

Despite this 180-degree change to Regulation B, the FRB (and the CFPB), continued to recognize that a guarantor is *not* an applicant within the natural meaning of that term. *See, e.g.*, 12 C.F.R. §202.7(d) (distinguishing between the "applicant" and an "additional party," whether the latter is a "spouse" or some "other person"); Official Staff Interpretations, 12 C.F.R. Pt. 202, Supp. I, comment 202.7, ¶¶ 7(d)(5), 7(d)(6) (distinguishing between the "applicant," also specifically referred to as the "borrower," and an "additional party," again whether a "spouse" or some "other person"); 54 Fed. Reg. 29,734, 29,735 (July 14, 1989) (referring to a "guarantor" as the "nonapplicant spouse"). In addition, because a guarantor—unlike an "applicant"—neither applies for nor receives credit, the FRB long recognized, and the CFPB recently has acknowledged (at least until the Government filed its brief in this Court) that a guarantor suffers no adverse action with respect to a prospective or existing loan. *See* 76 Fed. Reg. 41,590, 41,597 (July 15, 2011) (distinguishing between an "applicant" and a guarantor, and explaining that "[u]nder section

701(d)(6) of the ECOA and §202.2(c) of Regulation B, only an *applicant* can experience adverse action") (emphasis added).

Petitioners and the Government go to great lengths to gin up a litany of unnatural and unusual meanings of "applicant" in an attempt to defend the FRB's actions, but their arguments and those creative meanings ring hollow. This Court does not construe statutes by seeking uncommon or unusual meanings for the words Congress used. *Better Bus. Bureau of Washington, D.C. v. United States*, 326 U.S. 279, 283, (1945) ("Even the most liberal of constructions does not mean that statutory words and phrases are to be given unusual or tortured meanings unjustified by legislative intent. ").[22]

The Government, citing *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 550 U.S. 45 (2007) and *Alexander v. Sandoval*, 532 U.S. 275 (2001), relies on manufactured "ambiguity" to now argue that the FRB's 1985 amendment was a permissible "interpretation" of the ECOA. U.S. Br. at 33-34. But when the FRB amended Regulation B in 1985, it explicitly recognized that its expanded definition of "applicant" could not be squared with the ECOA definition. 50 Fed. Reg. 48,018,

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[22] The Government's belated claim of ambiguity also runs counter to "the foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. EPA*, 576 U.S. __, 135 S.Ct. ___, ___ (2015) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). Until the Government filed its *amicus* brief in this Court, neither the FRB nor the CFPB had claimed or even suggested that the ECOA definition is ambiguous.

48,020, 48,025 ("If a creditor violates [12 C.F.R. §202.7(d)] a guarantor whose signature has been illegally required has no legal remedy because section 706 of the [A]ct confers standing to sue only upon an "aggrieved *applicant*.") (emphasis added).

In fact, the cases the Government cites undermine rather than support its argument that the FRB's 1985 amendment to Regulation B was a permissible "interpretation" of the ECOA. *Sandoval* in particular speaks to the situation here, and makes clear that an agency cannot expand the scope of an explicit and defined statutory right of action:

> Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not. "[A regulation cannot] conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself.

Sandoval, 532 U.S. at 291 (internal citation omitted).

Petitioners may claim, rightly or wrongly, that they are the indirect victims of discrimination against PHC (the "applicant" under the ECOA for the loans at issue here), but Congress deliberately chose to prohibit only discrimination *against the applicant*, 15 U.S.C. §1691(a), and it likewise deliberately created a private right of action only for the aggrieved *applicant*. *Id.* §§ 1691e(a), (b), (c). "There is a basic difference between filling a gap left by Congress's silence and *rewriting rules that Congress has affirmatively and specifically enacted*." *Lamie v. U.S. Trustee*, 540 U.S.

526, 538 (2004) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)) (emphasis added).[23]

Any claim here lies, if at all, only in favor of the applicant, *i.e.*, the borrower, which is PHC, not Petitioners. The FRB lacked authority to redefine the ECOA definition of "applicant." The 1985 amendment to Regulation B—which purported to expand the statutory definition to include guarantors and others—therefore is *ultra vires*, and not a permissible "interpretation" of the ECOA. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) ("administrative interpretation of a statute contrary to language as plain as we find here is not entitled to deference.").[24]

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[23] *Global Crossing* is plainly distinguishable on its facts. There, the statute at issue created a cause of action in favor of "[a]ny person claiming to be damaged" by a violation of the statute. Nowhere did the statute define "person" or in any other way identify or limit potential claimants. *See* 550 U.S. at 52.

[24] Nor can Congress' "legislative silence" regarding the FRB's interpretive flip-flops be given any consequence, "particularly where administrative regulations are inconsistent with the controlling statute," *Brown*, 513 U.S. at 121, as here. "Where the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction." *Demarest*, 498 U.S. at 190. Moreover, there is no evidence here that Congress was aware, let alone approved, of the 1985 version of Regulation B when Congress amended the ECOA in 1988 or 2010. *U.S. v. Rutherford*, 442 U.S. 544, 554 n. 10 (1979) (It is only where "an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects," that the Court will presume that "the legislative intent has been correctly discerned.") (internal citation

D. This Case Is On All Fours With *Bd. Of Governors Of The Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361 (1986).

This case bears remarkable similarities to *Bd. of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361 (1986). In that case, the federal Bank Holding Company Act included an express and precise statutory definition of "bank" as the gateway provision for the entire statutory scheme. In particular, the Act defined a "bank" as an institution that "(1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." 474 U.S. at 363. In 1984—one year before the FRB amended Regulation B to expand "applicant" under the ECOA to include "guarantors"—the Board amended Regulation Y both to include institutions that accept deposits which "as a matter of practice" were payable on demand and to expand the definition of "commercial loans" to include various money market transactions, none of which the Board previously had regulated. *Id.* at 364. Various entities filed suit, challenging the expanded Regulation Y as being inconsistent with the statute's gateway definition of "bank."

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omitted); *see also* 2B N. Singer, *et al.*, *Sutherland Statutes and Statutory Construction*, §49:9, at pp. 134-135 (7th ed. 2008) (presumption of congressional-acquiescence is inapplicable "where nothing indicates that the legislature had its attention directed to the administrative interpretation upon reenactment"). Most importantly, "[a] regulation's age is no antidote to clear inconsistency with a statute, and the fact . [that a regulation] flies against the plain language of the statutory text exempts courts from any obligation to defer to it." *Brown*, 513 U.S. at 122.

This Court agreed with the challengers, and concluded that the Board had attempted to rewrite and expand the Bank Holding Company Act, not to construe or interpret an ambiguity. The Court began by noting that the Act gave the Board broad regulatory power, 474 U.S. at 365, but pointed out that the "breadth of that regulatory power rests on the Act's definition of the word 'bank.'" *Id.* The Court identified the reasons the Board chose to expand Regulations Y, and did not question those justifications as a policy matter. *Id.* at 367-368.

Applying the *Chevron* analysis, however, the Court observed that in "determining whether the Board was empowered to make such a change, we begin, of course, with the language of the statute." 474 U.S. at 368. Further, the "traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." *Id.* Considering first the Board's effort to expand the Act's gateway definition of "bank" to cover institutions that "as a matter of practice" provided deposits payable on demand, the Court concluded that the Board's regulation could not be squared with the statutory definition of institutions for which depositors had a "legal right" to demand payment. *Id.* Thus, "no amount of agency expertise – however sound may be the result – can make the words 'legal right' mean a right to do something 'as a matter of practice.'" *Id.*

Nor did the Board's effort to rewrite the statutory requirement of "commercial loans" to include money market transactions fare any better. Instead, the Court discussed the "common understanding of the term 'commercial loan,'" 474 U.S. at 370, and found no

reason that "the language 'commercial loan' should be given something other than its commonly accepted meaning." *Id.* at 371. Ultimately, the Court concluded that '[n]othing in the statutory language or the legislative history, therefore, indicates that the term 'commercial loan' meant anything different from its accepted ordinary commercial usage." *Id.* at 373. As a result, the "Board's definition of 'commercial loan'" was not a permissible interpretation of the Act. *Id.*

The Court similarly rejected the Board's arguments that its amendments to Regulation Y were consistent with the "purposes" of the Act. The Court noted that the Board's broad authority to implement the Act "only permits the Board to police within the boundaries of the Act; it does not permit the Board to expand its jurisdiction beyond the boundaries established by Congress. " 474 U.S. at 373 n. 6. Furthermore, the "'plain purpose' of legislation is determined in the first instance with reference to the plain language of the statute itself." *Id.* at 373. Even though "there is much to be said for regulating financial institutions that are the functional equivalent of banks," *id.* at 374, the Court found the Board exceeded its authority:

> Congress defined with specificity certain transactions that constitute banking subject to regulation. The statute may be imperfect, but the Board has no power to correct flaws that it perceives in the statute it is empowered to administer. Its rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute.

Id. If the statute "falls short of providing safeguards desirable or necessary to protect the public interest,

that is a problem for Congress, and not the Board or the courts, to address." *Id.* Instead, the Court's inquiry "must come to rest with the conclusion that the action of the Board in this case is inconsistent with the language of the statute. " *Id.* at 375.

Here, as in *Dimension Financial Corp.*, the governing federal statute explicitly defines its gateway provision, and thus necessarily limits the authority granted to the FRB to implement the statute. Here, the very same agency that amended Regulation Y in 1984 in an attempt to rewrite the Bank Holding Company Act's definition of "bank," also decided in 1985 to try and rewrite the ECOA's definition of "applicant" through Regulation B. Here, just as in *Dimension Financial Corp.*, the FRB's regulatory "interpretation" is contrary to the plain statutory language. Here, as in that case, the Government attempts to justify the FRB's rewriting of the statutory gateway definition by pointing to the broad delegation of authority the FRB was given in *some* respects and the reasons why rewriting the statute may make sense as a matter of policy.

But none of that alters the inevitable conclusion that the ECOA's gateway definition of "applicant" is clear and excludes guarantors. Indeed, with a few word substitutions, the Court's conclusion in *Dimension Financial Corp.* is equally applicable here:

> Congress defined with specificity [the "applicants"] subject to [protection]. The [ECOA] may be imperfect, but the Board has no power to correct flaws that it perceives in the statute it is empowered to administer. Its rulemaking power is limited to adopting regulations to carry into

> effect the will of Congress as expressed in the [ECOA].

Id. at 683.

The FRB of the mid-1980s apparently took a view of statutory "interpretation" not authorized by this Court's jurisprudence. Just as in *Dimension Financial Corp.*, the FRB here attempted to amend one of its regulations to redefine a statute and significantly expand the agency's statutory authority. The Court repeatedly has held, however, that "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *MCI Telecommunications*, 512 U.S. at 229. Whether or not to expand the ECOA statutory cause of action is the prerogative of Congress, not the FRB or the CFPB.

II. Petitioners Make A Number Of Arguments That Are Beyond The Scope Of The Questions Presented And Are Not Properly Before The Court.

A. Petitioners' Various Factual Allegations Regarding Their Guaranties Go To The Merits Of Any Potential ECOA Claim, Not The Question Of Who Is An ECOA "Applicant."

Petitioners argue that they did not voluntarily sign their guaranties, and claim they only did so because Respondent *required* them to in alleged violation of 12 C.F.R. §202.7(d). Pet. Br. at 2. Neither the validity of the "additional party" rule, however (a focal point of the Government's *amicus* brief), nor the merits of Petitioners' claim that CBR violated that regulation, is

before the Court because neither issue is encompassed by the questions presented.

Even assuming for the sake of argument that the "additional party" regulation itself is valid, Petitioners at most allege only a factual dispute on the merits under that regulation. The additional party rule only prohibits a creditor from *requiring* the signature of an applicant's spouse and then, only if the spouse lacks an interest in the borrowing entity or does not receive a benefit from the loan. 12 C.F.R. §202.7(d); Official Staff Interpretations, 12 C.F.R. Pt. 202, Supp. I, comment 202.7, ¶7(d)(6).[25] Nothing in the regulation or the ECOA prohibits a creditor from accepting a spousal guaranty when such a guaranty is offered by the borrower, or given by a spouse at the applicant-borrower's request. *Id.; see also U.S. v. Meadors,* 753

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[25] The Government selectively points to Petitioners' representation that they each "expect[ed] to derive substantial benefits" from the guaranteed loans, to suggest that Petitioners impliedly requested an extension of credit. U.S. Br. at 23. The Government, however, conveniently ignores the first part of that *same sentence* where Petitioners confirmed that they each had "a direct and substantial economic interest in [PHC]. . . ," as well as their representation in the immediately preceding paragraph that their guaranties were "entered into at the request of the Borrower." *See, e.g.*, App. A 12. The Government, like Petitioners, cannot pick and choose the guaranty provisions it likes and conveniently discard the rest. Accepting Petitioners' representations as true, as this Court should, there could be no ECOA violation under any scenario. The same is true with regard to Petitioner Patterson—even if the Court disregards her written representations—where she admitted under oath that she and the Trust through which the PHC-membership interest is held, and for which she is a trustee and beneficiary, are one and the same: "I am me, I am the trust, I am every [Patterson] LLC. . . We're all one." ROA A1412:23-24, A1413:8-A1414:5.

F.2d 590, 593 (7th Cir. 1985) (the ECOA was not implicated where wife voluntarily signed a guaranty, but was not required by the lender to do so). Nor is a creditor precluded from engaging in the common (and eminently sensible) practice of asking an applicant who, if anyone, will sign as guarantors, leaving it to the applicant to decide whom to offer as potential guarantors.[26]

The irony of Petitioners' argument on this point is striking. The Court must remember that Petitioners are seeking protection under the ECOA, a law designed to empower women in the credit markets and to treat them as the legal/financial equals of their male spouses in particular, and of men in general. Yet Petitioners ask the Court to find that their guaranty contracts should be relegated to an inferior class, less enforceable than guaranties signed by men, apparently because Petitioners are invoking gender stereotypes that they are hapless, unsophisticated wives of borrowers. Petitioners make this argument even though they acknowledged by their signatures that they *read*, *understood* and *agreed* to the terms of their guaranties, their guaranties accurately reflected their *intentions*, and they had an opportunity to consult with legal counsel prior to signing them.[27] App. A 30, 34.

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[26] Indeed, when a debtor defaults, as PHC did here, and the guarantors are called upon to answer for more than a mere potential loss, that is prima facie evidence that the creditor sought guaranties in the first instance for a valid reason, *i.e.*, because of legitimate concerns about the creditworthiness of the applicant.

[27] Petitioners also represented that providing their guaranties did not violate any law or regulation applicable to them. *See, e.g.*, App.

(continued...)

Petitioners made these representations in *thirteen* of the sixteen guaranties they each signed over the course of *five years*. Further, each of the sixteen times they signed a guaranty, they expressly represented that they were signing *at the request of the borrower* (PHC), and *not* at the request of CBR.[28] App. A 12, 23.

Petitioners make no claim that CBR somehow *forced* them to sign their guaranties, nor could they. To the contrary, they admitted (and the District Court found), that Petitioners voluntarily signed without objection. ROA A686, A689-A691. Petitioners nonetheless argue that they should be able to avoid their written obligations now by showing that the explicit and repeated representations they made in

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[27](...continued)
A 24. That statement necessarily included the ECOA and Regulation B.

[28] Petitioners are presumed to have known the law when they signed their guaranties. *U.S. to Use of Hine v. Morse*, 218 U.S. 493, 510-11 (1910); 31A C.J.S. *Evidence* §228 (2015). Thus, Petitioners knew that CBR could not *require* their guaranties (assuming their allegations that they have no interest in PHC are true; though they then misrepresented that in their guaranties, as well). Petitioners could have crossed out the now allegedly false representations in their guaranties before signing them, or they could have simply refused to sign. Petitioners chose not to do either and, instead, signed their guaranties, enabling PHC to reap the benefits of CBR's $2 million in loans for more than *seven years*. Petitioners reneged on and disavowed their multiple, express representations only after they were called upon to perform under their guaranties. The ECOA does not authorize guarantors to game the system in this manner.

sixteen guaranties were in fact *false*. In Missouri,[29] however, as in most jurisdictions, it is black letter law that a person is presumed to have read and agreed to a contract she signs, *Warren v. Paragon Technologies Group, Inc.*, 950 S.W.2d 844, 846 (Mo. 1997) ("[p]arties are presumed to read what they sign]"), and cannot use her own fraud or intentional ignorance to escape her written representations in a contract. *Henderson v. Henderson's Ex'r*, 13 Mo. 151, 1850 WL 4163, 2 (1850) (a party cannot use its own fraud to vary or contradict a contract); *accord* 17A C.J.S. *Contracts* §193 (2015) ("[O]ne who refrains from reading a contract and in conscious ignorance of its terms voluntarily assents thereto . . cannot be heard to say that the instrument signed does not express the real contract, that the provisions are contrary to her intentions or understanding, that she failed to comprehend and assent to the plain meaning of the language employed in the contract or did not understand the terms used, or that she neglected to insert a stipulation essential to . . her protection.").

The ECOA's overriding original purpose was to place women on equal footing with men in credit transactions. To find that Petitioners are less bound by their written representations in credit transactions than their husbands (or not bound at all), simply because they are women and wives, and despite their explicit, repeated representations, would be a perversion of the ECOA and its goal. Petitioners ask for

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[29] Petitioners' guaranties provide that they are "governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of Missouri, without regard to its conflicts of law provisions." *See, e.g.*, App. A 29.

nothing less than a step backwards into renewed reliance on gender stereotypes, rather than the strong step forward towards gender equality that Congress sought to achieve in the ECOA. In any event, the factual disputes Petitioners attempt to raise regarding their guaranties are not before the Court.

B. Petitioners Made No Claim Below For Declaratory Relief Separate From Their Assertion That They Are "Applicants" Under The ECOA.

Petitioners suggest that regardless of whether they are "aggrieved applicants," the Court must remand this case to the Eighth Circuit, because the District Court allegedly erred in finding that Petitioners lacked standing to seek declaratory relief to challenge the legality of their guaranties, and the Eighth Circuit allegedly also erred in affirming that ruling. Pet. Br. at 54. Petitioners' claim for declaratory relief in their complaint, however, was limited to the statutorily-conferred right to obtain declaratory and equitable relief under §1691e(c), and was predicated *solely* on Petitioners' argument that they are ECOA *applicants*. ROA A29. In the District Court, Petitioners did not bring a separate claim under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, *et seq*. Nor did they make the declaratory relief argument they make in this Court. ROA A1183-A1211.

Rather, Petitioners' argument in the District Court was limited to their contention that they are ECOA "applicants" under Regulation B. ROA A1183-A1211. Thus, any separate argument or claim for declaratory relief (apart from the ECOA) was waived on appeal. *See, e.g., Smith v. City of Des Moines, Iowa,* 99 F.3d

1466, 1473 (8th Cir. 1996) ("We will not reverse a grant of summary judgment on the basis of an argument not presented below."); *Exeter Bancorporation, Inc. v. Kemper Securities Group, Inc.*, 58 F.3d 1306, 1318 (8th Cir. 1995) (plaintiff's argument on appeal was waived by failure to raise it in summary judgment briefing).

Petitioners' argument that the Eighth Circuit purportedly or implicitly rejected their argument on the merits ignores that the Eighth Circuit only addressed the ECOA issue, and did not address any other arguments Petitioners made. In any event, like their factual arguments about their guaranties, Petitioners' alleged alternative basis for declaratory relief is outside the questions presented.

CONCLUSION

CBR requests that the Court give the precise ECOA definition of "applicant"—one who "applies" for "credit" "directly"—its ordinary meaning, as construed in light of the history, context and structure of the ECOA. Doing so leaves only one supportable conclusion: a *guarantor* is not an ECOA "applicant."

Regulation B's purported redefinition of "applicant" to include "guarantors" is *ultra vires*. Regulation B is not an "interpretation" of the ECOA, much less a "permissible" one. Instead, it represents an improper agency attempt to redefine a statute Congress enacted. The Court should affirm the decision of the Eighth Circuit which correctly interpreted the ECOA.

Respectfully submitted,

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Counsel for Respondent

APPENDIX A

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APPENDIX A

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GUARANTY*

(Specific Debt - Unlimited)

DATE AND PARTIES. The date of this Guaranty is March 31, 2005. The parties and their addresses are:

LENDER:

COMMUNITY BANK OF RAYMORE
801 W Foxwood Drive
P O Box 200
Raymore, Missouri 64083-0200
Telephone: (816) 322-2100

BORROWER:

PHC DEVELOPMENT, L.L.C.
a Limited Liability Company
200 NW Executive Way
Lee's Summit, Missouri 64063

GUARANTOR:

VALERIE J. HAWKINS
25819 S. Stark Road
Peculiar, Missouri 64078

1. DEFINITIONS. As used in this Guaranty, the terms have the following meanings:

A. Pronouns. The pronouns "I", "me" and "my" refer to all persons or entities signing this Guaranty, individually and together. "You" and "your" refer to the Lender.

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* Non-substantive print appearing in the header and/or footer of the original document has been omitted.

B. Note. "Note" refers to the document that evidences the Borrower's indebtedness, and any extensions, renewals, modifications and substitutions of the Note.

C. Property. "Property" means any property, real, personal or intangible, that secures performance of the obligations of the Note, Debt, or this Guaranty.

2. SPECIFIC DEBT GUARANTY. For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and to induce you, at your option, to make loans or engage in any other transactions with the Borrower from time to time, I absolutely and unconditionally agree to all terms of and guaranty to you the payment and performance of the following described Debt(s) of the Borrower including without limitation, all principal, accrued interest, attorneys' fees and collection costs, when allowed by law, that may become due from the Borrower to you in collecting and enforcing the Debt and all other agreements with respect to the Borrower.

A promissory note or other agreement, No. 9035923, dated March 31, 2005, from PHC Development, L.L.C. (Borrower) to you, in the amount of $249,900.00.

In addition, Debt refers to debts, liabilities, and obligations of the Borrower (including, but not limited to, amounts agreed to be paid under the terms of any notes or agreements securing the payment of any debt, loan, liability or obligation, overdrafts, letters of credit, guaranties, advances for taxes, insurance, repairs and storage, and all extensions, renewals, refinancings and modifications of these debts) whether now existing or

created or incurred in the future, due or to become due, or absolute or contingent, including obligations and duties arising from the terms of all documents prepared or submitted for the transaction such as applications, security agreements, disclosures, and the Note.

You may, without notice, apply this Guaranty to such Debt of the Borrower as you may select from time to time.

3. EXTENSIONS. I consent to all renewals, extensions, modifications and substitutions of the Debt which may be made by you upon such terms and conditions as you may see fit from time to time without further notice to me and without limitation as to the number of renewals, extensions, modifications or substitutions.

4. UNCONDITIONAL LIABILITY. I am unconditionally liable under this Guaranty, regardless of whether or not you pursue any of your remedies against the Borrower, against any other maker, surety, guarantor or endorser of the Debt or against any Property. You may sue me alone, or anyone else who is obligated on this Guaranty, or any number of us together, to collect the Debt. My liability is not conditioned on the signing of this Guaranty by any other person and further is not subject to any condition not expressly set forth in this Guaranty or any instrument executed in connection with the Debt. My obligation to pay according to the terms of this Guaranty shall not be affected by the illegality, invalidity or unenforceability of any notes or agreements evidencing the Debt, the violation of any applicable usury laws, forgery, or any other

circumstances which make the indebtedness unenforceable against the Borrower. I will remain obligated to pay on this Guaranty even if any other person who is obligated to pay the Debt, including the Borrower, has such obligation discharged in bankruptcy, foreclosure, or otherwise discharged by law.

5. BANKRUPTCY. If a bankruptcy petition should at any time be filed by or against the Borrower, the maturity of the Debt, so far as my liability is concerned, shall be accelerated and the Debt shall be immediately payable by me. I acknowledge and agree that this Guaranty, and the Debt secured hereby, will remain in full force and effect at all times, notwithstanding any action or undertakings by, or against, you or against any Property, in connection with any obligation in any proceeding in the United States Bankruptcy Courts. Such action or undertaking includes, without limitation, valuation of Property, election of remedies or imposition of secured or unsecured claim status upon claims by you, pursuant to the United States Bankruptcy Code, as amended. In the event that any payment of principal or interest received and paid by any other guarantor, borrower, surety, endorser or co-maker is deemed, by final order of a court of competent jurisdiction, to have been a voidable preference under the bankruptcy or insolvency laws of the United States or otherwise, then my obligation will remain as an obligation to you and will not be considered as having been extinguished.

6. REVOCATION. I agree that this is an absolute and unconditional Guaranty. This Guaranty cannot be

revoked and will remain in effect until the Debt is paid in full.

7. PROPERTY. I agree that any Property may be assigned, exchanged, released in whole or in part or substituted without notice to me and without defeating, discharging or diminishing my liability. My obligation is absolute and your failure to perfect any security interest or any act or omission by you which impairs the Property will not relieve me or my liability under this Guaranty. You are under no duty to preserve or protect any Property until you are in actual or constructive possession. For purposes of this paragraph, you will only be in "actual" possession when you have physical, immediate and exclusive control over the Property and have accepted such control in writing. Further, you will only be deemed to be in "constructive" possession when you have both the power and intent to exercise control over the Property.

8. DEFAULT. I will be in default if any of the following occur:

A. Payments. I fail to make a payment in full when due.

B. Insolvency or Bankruptcy. The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against me, Borrower, or any co-

signer, endorser, surety or guarantor of this Guaranty or any Debt.

C. Death or Incompetency. I die or am declared legally incompetent.

D. Failure to Perform. I fail to perform any condition or to keep any promise or covenant of this Guaranty.

E. Other Documents. A default occurs under the terms of any other document relating to the Debt.

F. Other Agreements. I am in default on any other debt or agreement I have with you.

G. Misrepresentation. I make any verbal or written statement or provide any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.

H. Judgment. I fail to satisfy or appeal any judgment against me.

I. Forfeiture. The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.

J. Name Change. I change my name or assume an additional name without notifying you before making such a change.

K. Property Transfer. I transfer all or a substantial part of my money or property.

L. Property Value. The value of the Property declines or is impaired.

M. Insecurity. You reasonably believe that you are insecure.

9. WAIVERS AND CONSENT. To the extent not prohibited by law and except for a required notice of right to cure for the failure to make a required payment, if any, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

A. Additional Waivers. In addition, to the extent permitted by law, I consent to certain actions you may take, and generally waive defenses that may be available based on these actions or based on the status of a party to the Debt or this Guaranty.

(1) You may renew or extend payments on the Debt, regardless of the number of such renewals or extensions.

(2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.

(3) You may release, substitute or impair any Property.

(4) You, or any institution participating in the Debt, may invoke your right of set-off.

(5) You may enter into any sales, repurchases or participations of the Debt to any person in any amounts and I waive notice of such sales, repurchases or participations.

(6) I agree that the Borrower is authorized to modify the terms of the Debt or any instrument securing, guarantying or relating to the Debt.

(7) You may undertake a valuation of any Property in connection with any proceedings under the United States Bankruptcy Code concerning the Borrower or me, regardless of any such valuation, or actual amounts received by you arising from the sale of such Property.

(8) I agree to consent to any waiver granted the Borrower, and agree that any delay or lack of diligence in the enforcement of the Debt, or any failure to file a claim or otherwise protect any of the Debt, in no way affects or impairs my liability.

(9) I agree to waive reliance on any anti-deficiency statutes, through subrogation or otherwise, and such statutes in no way affect or impair my liability. In addition, I waive any right of subrogation, contribution, reimbursement, indemnification, exoneration, and any other right I may have to enforce any remedy which you now have or in the future may have against the Borrower or another guarantor or as to any Property.

Any Guarantor who is an "insider," as contemplated by the United States Bankruptcy Code, 11 U.S.C. 101, as amended, makes these waivers permanently. (An insider includes, among others, a director, officer, partner, or other person in control of the Borrower, a person or an entity that is a co-partner with the Borrower, an entity in which the Borrower is a general partner, director, officer or other person in control or a close relative of any of these other persons.) Any Guarantor who is not an insider

makes these waivers until all Debt is fully repaid.

B. No Waiver By Lender. Your course of dealing, or your forbearance from, or delay in, the exercise of any of your rights, remedies, privileges or right to insist upon my strict performance of any provisions contained in the Debt instruments, shall not be construed as a waiver by you, unless any such waiver is in writing and is signed by you.

C. Waiver of Claims. I waive all claims for loss or damage caused by your acts or omissions where you acted reasonably and in good faith.

10. REMEDIES. After the Borrower or I default, and after you give any legally required notice and opportunity to cure the default, you may at your option do any one or more of the following.

A. Acceleration. You may make all or any part of the amount owing by the terms of this Guaranty immediately due.

B. Sources. You may use any and all remedies you have under state or federal law or in any documents relating to the Debt.

C. Insurance Benefits. You may make a claim for any and all insurance benefits or refunds that may be available on default.

D. Payments Made on the Borrower's Behalf. Amounts advanced on the Borrower's behalf will be immediately due and may be added to the balance owing under the Debt.

E. Termination. You may terminate my right to obtain advances and may refuse to make any further extensions of credit.

F. Attachment. You may attach or garnish my wages or earnings.

G. Set-Off. You may use the right of set-off. This means you may set-off any amount due and payable under the terms of this Guaranty against any right I have to receive money from you.

My right to receive money from you includes any deposit or share account balance I have with you; any money owed to me on an item presented to you or in your possession for collection or exchange; and any repurchase agreement or other non-deposit obligation. "Any amount due and payable under the terms of this Guaranty" means the total amount to which you are entitled to demand payment under the terms of this Guaranty at the time you set-off.

Subject to any other written contract, if my right to receive money from you is also owned by someone who has not agreed to pay the Debt, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement.

Your right of set-off does not apply to an account or other obligation where my rights arise only in a representative capacity. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set-off against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right of set-off.

H. Waiver. Except as otherwise required by law, by choosing any one or more of these remedies you do not give up your right to use any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

11. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Guaranty or any other document relating to the Debt. To the extent permitted by law, expenses include, but are not limited to, reasonable attorneys' fees, court costs and other legal expenses. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me.

12. WARRANTIES AND REPRESENTATIONS. I have the right and authority to enter into this Guaranty. The execution and delivery of this Guaranty

will not violate any agreement governing me or to which I am a party.

In addition, I represent and warrant that this Guaranty was entered into at the request of the Borrower, and that I am satisfied regarding the Borrower's financial condition and existing indebtedness, authority to borrow and the use and intended use of all Debt proceeds. I further represent and warrant that I have not relied on any representations or omissions from you or any information provided by you respecting the Borrower, the Borrower's financial condition and existing indebtedness, the Borrower's authority to borrow or the Borrower's use and intended use of all Debt proceeds.

13. RELIANCE. I acknowledge that you are relying on this Guaranty in extending credit to the Borrower, and I have signed this Guaranty to induce you to extend such credit. I represent and warrant to you that I have a direct and substantial economic interest in the Borrower and expect to derive substantial benefits from any loans and financial accommodations resulting in the creation of indebtedness guarantied hereby.

14. APPLICABLE LAW. This Guaranty is governed by the laws of Missouri, the United States of America and to the extent required, by the laws of the jurisdiction where the Property is located.

15. AMENDMENT, INTEGRATION AND SEVERABILITY. This Guaranty may not be amended or modified by oral agreement. No amendment or modification of this Guaranty is effective unless made in writing and executed by you and me. This Guaranty and the other Loan Documents are the complete and

final expression of the agreement. If any provision of this Guaranty is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

16. ASSIGNMENT. If you assign any of the Debts, you may assign all or any part of this Guaranty without notice to me or my consent, and this Guaranty will inure to the benefit of your assignee to the extent of such assignment. You will continue to have the unimpaired right to enforce this Guaranty as to any of the Debts that are not assigned. This Guaranty shall inure to the benefit of and be enforceable by you and your successors and assigns and any other person to whom you may grant an interest in the Debts and shall be binding upon and enforceable against me and my personal representatives, successors, heirs and assigns.

17. INTERPRETATION. Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Guaranty.

18. NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS. Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Guarantor will be deemed to be notice to all Guarantors. I will inform you in writing of any change in my name, address or other application information. I will provide you any financial statement or information you request. All financial statements and information I give you will be correct and complete.

I agree to sign, deliver, and file any additional documents or certifications that you may consider necessary to perfect, continue, and preserve my obligations under this Guaranty and to confirm your lien status on any Property. Time is of the essence.

19. CREDIT INFORMATION. I agree that from time to time you may obtain credit information about me from others, including other lenders and credit reporting agencies, and report to others (such as a credit reporting agency) your credit experience with me. I agree that you will not be liable for any claim arising from the use of information provided to you by others or for providing such Information to others.

20. AGREEMENT TO ARBITRATE. You or I may submit to binding arbitration any dispute, claim or other matter in question between or among you and me that arises out of or relates to this Transaction (Dispute), except as otherwise indicated in this section or as you and I agree to in writing. For purposes of this section, this Transaction includes this Guaranty and any other document relating to the Debt, and proposed loans or extensions of credit that relate to this Guaranty. You or I will not arbitrate any Dispute within any "core proceedings" under the United States bankruptcy laws.

You and I must consent to arbitrate any Dispute concerning the Debt secured by real estate at the time of the proposed arbitration. You may foreclose or exercise any powers of sale against real property securing the Debt underlying any Dispute before, during or after any arbitration. You may also enforce the Debt secured by this real property and underlying the Dispute before, during or after any arbitration.

You or I may seek provisional remedies at any time from a court having jurisdiction to preserve the rights of or to prevent irreparable injury to you or me. Foreclosing or exercising a power of sale, beginning and continuing a judicial action or pursuing self-help remedies will not constitute a waiver of the right to compel arbitration.

The arbitrator will determine whether a Dispute is arbitrable. A single arbitrator will resolve any Dispute, whether individual or joint in nature, or whether based on contract, tort, or any other matter at law or in equity. The arbitrator may consolidate any Dispute with any related disputes, claims or other matters in question not arising out of this Transaction. Any court having jurisdiction may enter a judgment or decree on the arbitrator's award. The judgment or decree will be enforced as any other judgment or decree.

You and I acknowledge that the agreements, transactions or the relationships which result from the agreements or transactions between and among you and me involve interstate commerce. The United States Arbitration Act will govern the interpretation and enforcement of this section.

The American Arbitration Association's Commercial Arbitration Rules, in effect on the date of this Guaranty, will govern the selection of the arbitrator and the arbitration process, unless otherwise agreed to in this Guaranty or another writing.

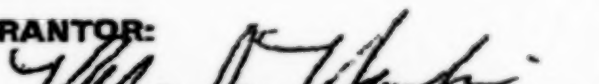
21. WAIVER OF TRIAL FOR ARBITRATION. You and I understand that the parties have the right or opportunity to litigate any Dispute through a trial by judge or jury, but that the

parties prefer to resolve Disputes through arbitration instead of litigation. If any Dispute is arbitrated, you and I voluntarily and knowingly waive the right to have a trial by jury or judge during the arbitration.

ORAL AGREEMENTS OR COMMITMENTS TO LOAN MONEY, EXTEND CREDIT OR TO FORBEAR FROM ENFORCING REPAYMENT OF A DEBT INCLUDING PROMISES TO EXTEND OR RENEW SUCH DEBT ARE NOT ENFORCEABLE, REGARDLESS OF THE LEGAL THEORY UPON WHICH IT IS BASED THAT IS IN ANY WAY RELATED TO THE CREDIT AGREEMENT. TO PROTECT YOU (GUARANTOR) AND US (LENDER) FROM MISUNDERSTANDING OR DISAPPOINTMENT, ANY AGREEMENTS WE REACH COVERING SUCH MATTERS ARE CONTAINED IN THIS WRITING, WHICH IS THE COMPLETE AND EXCLUSIVE STATEMENT OF THE AGREEMENT BETWEEN US, EXCEPT AS WE MAY LATER AGREE IN WRITING TO MODIFY IT.

22. SIGNATURES. By signing under seal, I agree to the terms contained in this Guaranty. I also acknowledge receipt of a copy of this Guaranty.

GUARANTOR:



(Seal)

Valerie J. Hawkins

Individually

[Loan No: 9037410]

COMMERCIAL GUARANTY*

Principal	Loan Date	Maturity	Loan No.	Call / Coll	Account	Officer JW	Initials
References in the boxes above are for Lender's use only and do not limit the applicability of this document to any particular loan or item. Any item above containing "* * *" has been omitted due to text length limitations.							

Borrower: PHC Development LLC
3550 NE Ralph Powell Road
Lees Summit, MO 64064

Lender: Community Bank of Raymore
801 W. Foxwood Dr
P O Box 200
Raymore, MO 64083

Guarantor: Janice A Patterson
RR2 Box 169
Adrian, MO 64720

CONTINUING GUARANTEE OF PAYMENT AND PERFORMANCE. For good and valuable consideration, Guarantor absolutely and unconditionally guarantees full and punctual payment and satisfaction of Guarantor's Share of the Indebtedness of Borrower to Lender, and the performance and discharge of all Borrower's obligations

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* Non-substantive print appearing in the header and/or footer of the original document has been omitted.

under the Note and the Related Documents. This is a guaranty of payment and performance and not of collection, so Lender can enforce this Guaranty against Guarantor even when Lender has not exhausted Lender's remedies against anyone else obligated to pay the Indebtedness or against any collateral securing the Indebtedness, this Guaranty or any other guaranty of the Indebtedness. Guarantor will make any payments to Lender or its order on demand, in legal tender of the United States of America, in same-day funds, without set-off or deduction or counterclaim, and will otherwise perform Borrower's obligations under the Note and Related Documents. Under this Guaranty, Guarantor's obligations are continuing.

INDEBTEDNESS. The word "Indebtedness" as used in this Guaranty means all of the principal amount outstanding from time to time and at any one or more times, accrued unpaid interest thereon and all collection costs and legal expenses related thereto permitted by law, attorneys' fees, arising from any and all debts, liabilities and obligations of every nature or form, now existing or hereafter arising or acquired, that Borrower individually or collectively or interchangeably with others, owes or will owe Lender. "Indebtedness" includes, without limitation, loans, advances, debts, overdraft Indebtedness, credit card indebtedness, lease obligations, liabilities and obligations under any interest rate protection agreements or foreign currency exchange agreements or commodity price protection agreements, other obligations, and liabilities of Borrower, and any present or future judgments against Borrower, future advances, loans or transactions that renew, extend, modify, refinance, consolidate or substitute these debts,

liabilities and obligations whether: voluntarily or involuntarily incurred; due or to become due by their terms or acceleration; absolute or contingent; liquidated or unliquidated; determined or undetermined; direct or indirect; primary or secondary in nature or arising from a guaranty or surety; secured or unsecured; joint or several or joint and several; evidenced by a negotiable or non-negotiable instrument or writing; originated by Lender or another or others; barred or unenforceable against Borrower for any reason whatsoever; for any transactions that may be voidable for any reason (such as infancy, insanity, ultra vires or otherwise); and originated then reduced or extinguished and then afterwards increased or reinstated.

If Lender presently holds one or more guaranties, or hereafter receives additional guaranties from Guarantor, Lender's rights under all guaranties shall be cumulative. This Guaranty shall not (unless specifically provided below to the contrary) affect or invalidate any such other guaranties. Guarantor's liability will be Guarantor's aggregate liability under the terms of this Guaranty and any such other unterminated guaranties.

GUARANTOR'S SHARE OF THE INDEBTEDNESS. The words "Guarantor's Share of the Indebtedness" as used in this Guaranty mean 100.000% of the principal amount of the Indebtedness that is outstanding from time to time and at any one or more times. "Guarantor's Share of the Indebtedness" also includes all accrued unpaid interest on the Indebtedness and all collection costs, expenses and attorneys' fees whether or not there is a lawsuit, and if

there is a lawsuit, any fees and costs for trial and appeals paid or incurred by Lender for the collection of the Indebtedness, the realization on any collateral securing the Indebtedness or any guaranty of the Indebtedness (including this Guaranty), or the enforcement of this Guaranty.

Lender shall determine Guarantor's Share of the Indebtedness when Lender makes demand on Guarantor. After a determination, Guarantor's Share of the Indebtedness will only be reduced by sums actually paid by Guarantor under this Guaranty, but will not be reduced by sums from any other source including, but not limited to, sums realized from any collateral securing the Indebtedness or this Guaranty, or payments by anyone other than Guarantor, or reductions by operation of law, judicial order or equitable principles. Lender has the sole and absolute discretion to determine how sums shall be applied among guaranties of the Indebtedness.

The above limitation on liability is not a restriction on the amount of the Note of Borrower to Lender either in the aggregate or at any one time.

CONTINUING GUARANTY. THIS IS A "CONTINUING GUARANTY" UNDER WHICH GUARANTOR AGREES TO GUARANTEE THE FULL AND PUNCTUAL PAYMENT, PERFORMANCE AND SATISFACTION OF THE INDEBTEDNESS OF BORROWER TO LENDER, NOW EXISTING OR HEREAFTER ARISING OR ACQUIRED, ON AN OPEN AND CONTINUING BASIS. ACCORDINGLY, ANY PAYMENTS MADE ON THE INDEBTEDNESS WILL NOT DISCHARGE OR DIMINISH GUARANTOR'S OBLIGATIONS AND LIABILITY

UNDER THIS GUARANTY FOR ANY REMAINING AND SUCCEEDING INDEBTEDNESS EVEN WHEN ALL OR PART OF THE OUTSTANDING INDEBTEDNESS MAY BE A ZERO BALANCE FROM TIME TO TIME.

DURATION OF GUARANTY. This Guaranty will take effect when received by Lender without the necessity of any acceptance by Lender, or any notice to Guarantor or to Borrower, and will continue in full force until all the Indebtedness incurred or contracted before receipt by Lender of any notice of revocation shall have been fully and finally paid and satisfied and all of Guarantor's other obligations under this Guaranty shall have been performed in full. If Guarantor elects to revoke this Guaranty, Guarantor may only do so in writing. Guarantor's written notice of revocation must be mailed to Lender, by certified mail, at Lender's address listed above or such other place as Lender may designate in writing. Written revocation of this Guaranty will apply only to new Indebtedness created after actual receipt by Lender of Guarantor's written revocation. For this purpose and without limitation, the term "new Indebtedness" does not include the Indebtedness which at the time of notice of revocation is contingent, unliquidated, undetermined or not due and which later becomes absolute, liquidated, determined or due. For this purpose and without limitation, "new Indebtedness" does not include all or part of the Indebtedness that is: incurred by Borrower prior to revocation; incurred under a commitment that became binding before revocation; any renewals, extensions, substitutions, and modifications of the Indebtedness. This Guaranty shall bind Guarantor's estate as to the Indebtedness

created both before and after Guarantor's death or incapacity, regardless of Lender's actual notice of Guarantor's death. Subject to the foregoing, Guarantor's executor or administrator or other legal representative may terminate this Guaranty in the same manner in which Guarantor might have terminated it and with the same effect. Release of any other guarantor or termination of any other guaranty of the Indebtedness shall not affect the liability of Guarantor under this Guaranty. A revocation Lender receives from any one or more Guarantors shall not affect the liability of any remaining Guarantors under this Guaranty. It is anticipated that fluctuations may occur in the aggregate amount of the Indebtedness covered by this Guaranty, and Guarantor specifically acknowledges and agrees that reductions in the amount of the Indebtedness, even to zero dollars ($0.00), shall not constitute a termination of this Guaranty. This Guaranty is binding upon Guarantor and Guarantor's heirs, successors and assigns so long as any of the Guarantor's Share of the Indebtedness remains unpaid and even though the Guarantor's Share of the Indebtedness may from time to time be zero dollars ($0.00).

GUARANTOR'S AUTHORIZATION TO LENDER. Guarantor authorizes Lender, either before or after any revocation hereof, without notice or demand and without lessening Guarantor's liability under this Guaranty from time to time: (A) prior to revocation as set forth above, to make one or more additional secured or unsecured loans to Borrower, to lease equipment or other goods to Borrower, or otherwise to extend additional credit to Borrower; (B) to alter, compromise, renew, extend, accelerate, or otherwise change one or

more times the time for payment or other terms of the Indebtedness or any part of the Indebtedness, including increases and decreases of the rate of interest, principal amount, fees or other charges on the Indebtedness; extensions may be repeated and may be for longer than the original loan term; (C) to take and hold security for the payment of this Guaranty or the Indebtedness, and exchange, enforce, waive, subordinate, fail or decide not to perfect, and release any such security, with or without the substitution of new collateral; (D) to release, substitute, agree not to sue, or deal with any one or more of Borrower's sureties, endorsers, or other guarantors on any terms or in any manner Lender may choose; (E) to determine how, when and what application of payments and credits shall be made on the Indebtedness; (F) to apply such security and direct the order or manner of sale thereof, including without limitation, any nonjudicial sale permitted by the terms of the controlling security agreement or deed of trust, as Lender in its discretion may determine; (G) to sell, transfer, assign or grant participations in all or any part of the Indebtedness; and (H) to assign or transfer this Guaranty in whole or in part.

GUARANTOR'S REPRESENTATIONS AND WARRANTIES. Guarantor represents and warrants to Lender that (A) no representations or agreements of any kind have been made to Guarantor which would limit or qualify in any way the terms of this Guaranty; (B) this Guaranty is executed at Borrower's request and not at the request of Lender; (C) Guarantor has full power, right and authority to enter into this Guaranty; (D) the provisions of this Guaranty do not conflict with or result in a default under any agreement

or other Instrument binding upon Guarantor and do not result in a violation of any law, regulation, court decree or order applicable to Guarantor; (E) Guarantor has not and will not, without the prior written consent of Lender, sell, lease, assign, encumber, hypothecate, transfer, or otherwise dispose of all or substantially all of Guarantor's assets, or any interest therein; (F) upon Lender's request, Guarantor will provide to Lender financial and credit information in form acceptable to Lender, and all such financial information which currently has been, and all future financial information which will be provided to Lender is and will be true and correct in all material respects and fairly present Guarantor's financial condition as of the dates the financial information is provided; (G) no material adverse change has occurred in Guarantor's financial condition since the date of the most recent financial statements provided to Lender and no event has occurred which may materially adversely affect Guarantor's financial condition; (H) no litigation, claim, investigation, administrative proceeding or similar action (including those for unpaid taxes) against Guarantor is pending or threatened; (I) Lender has made no representation to Guarantor as to the creditworthiness of Borrower; and (J) Guarantor has established adequate means of obtaining from Borrower on a continuing basis information regarding Borrower's financial condition. Guarantor agrees to keep adequately informed from such means of any facts, events, or circumstances which might in any way affect Guarantor's risks under this Guaranty, and Guarantor further agrees that, absent a request for information, Lender shall have no obligation to disclose to Guarantor any information or documents acquired

by Lender in the course of its relationship with Borrower.

GUARANTOR'S WAIVERS. Except as prohibited by applicable law, Guarantor waives any right to require Lender (A) to continue lending money or to extend other credit to Borrower; (B) to make any presentment, protest, demand, or notice of any kind, including notice of any nonpayment of the Indebtedness or of any nonpayment related to any collateral, or notice of any action or nonaction on the part of Borrower, Lender, any surety, endorser, or other guarantor in connection with the Indebtedness or in connection with the creation of new or additional loans or obligations; (C) to resort for payment or to proceed directly or at once against any person, including Borrower or any other guarantor; (D) to proceed directly against or exhaust any collateral held by Lender from Borrower, any other guarantor, or any other person; (E) to give notice of the terms, time, and place of any public or private sale of personal property security held by Lender from Borrower or to comply with any other applicable provisions of the Uniform Commercial Code; (F) to pursue any other remedy within Lender's power; or (G) to commit any act or omission of any kind, or at any time, with respect to any matter whatsoever.

Guarantor also waives any and all rights or defenses based on suretyship or impairment of collateral including, but not limited to, any rights or defenses arising by reason of (A) any "one action" or "anti-deficiency" law or any other law which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor, before or after Lender's commencement or completion of any

foreclosure action, either judicially or by exercise of a power of sale; (B) any election of remedies by Lender which destroys or otherwise adversely affects Guarantor's subrogation rights or Guarantor's rights to proceed against Borrower for reimbursement, including without limitation, any loss of rights Guarantor may suffer by reason of any law limiting, qualifying, or discharging the Indebtedness; (C) any disability or other defense of Borrower, of any other guarantor, or of any other person, or by reason of the cessation of Borrower's liability from any cause whatsoever, other than payment in full in legal tender, of the Indebtedness; (D) any right to claim discharge of the Indebtedness on the basis of unjustified impairment of any collateral for the Indebtedness; (E) any statute of limitations, if at any time any action or suit brought by Lender against Guarantor is commenced, there is outstanding Indebtedness which is not barred by any applicable statute of limitations; or (F) any defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness. If payment is made by Borrower, whether voluntarily or otherwise, or by any third party, on the Indebtedness and thereafter Lender is forced to remit the amount of that payment to Borrower's trustee in bankruptcy or to any similar person under any federal or state bankruptcy law or law for the relief of debtors, the Indebtedness shall be considered unpaid for the purpose of the enforcement of this Guaranty.

Guarantor further waives and agrees not to assert or claim at any time any deductions to the amount guaranteed under this Guaranty for any claim of setoff, counterclaim, counter demand, recoupment or similar

right, whether such claim, demand or right may be asserted by the Borrower, the Guarantor, or both.

GUARANTOR'S UNDERSTANDING WITH RESPECT TO WAIVERS. Guarantor warrants and agrees that each of the waivers set forth above is made with Guarantor's full knowledge of its significance and consequences and that, under the circumstances, the waivers are reasonable and not contrary to public policy or law. If any such waiver is determined to be contrary to any applicable law or public policy, such waiver shall be effective only to the extent permitted by law or public policy.

COLLATERAL. This Guaranty is secured by 2nd Deed of Trust on property located at 715 W Foxwood Drive, Raymore, MO, in addition to any property that may be governed by R.S.MO. Section 443.055.

RIGHT OF SETOFF. To the extent permitted by applicable law, Lender reserves a right of setoff in all Guarantor's accounts with Lender (whether checking, savings, or some other account). This includes all accounts Guarantor holds jointly with someone else and all accounts Guarantor may open in the future. However, this does not include any IRA or Keogh accounts, or any trust accounts for which setoff would be prohibited by law. Guarantor authorizes Lender, to the extent permitted by applicable law, to hold these funds if there is a default, and Lender may apply the funds in these accounts to pay what Guarantor owes under the terms of this Guaranty.

SUBORDINATION OF BORROWER'S DEBTS TO GUARANTOR. Guarantor agrees that the Indebtedness, whether now existing or hereafter

created, shall be superior to any claim that Guarantor may now have or hereafter acquire against Borrower, whether or not Borrower becomes insolvent. Guarantor hereby expressly subordinates any claim Guarantor may have against Borrower, upon any account whatsoever, to any claim that Lender may now or hereafter have against Borrower. In the event of insolvency and consequent liquidation of the assets of Borrower, through bankruptcy, by an assignment for the benefit of creditors, by voluntary liquidation, or otherwise, the assets of Borrower applicable to the payment of the claims of both Lender and Guarantor shall be paid to Lender and shall be first applied by Lender to the Indebtedness. Guarantor does hereby assign to Lender all claims which it may have or acquire against Borrower or against any assignee or trustee in bankruptcy of Borrower; provided however, that such assignment shall be effective only for the purpose of assuring to Lender full payment in legal tender of the Indebtedness. If Lender so requests, any notes or credit agreements now or hereafter evidencing any debts or obligation of Borrower to Guarantor shall be marked with a legend that the same are subject to this Guaranty and shall be delivered to Lender. Guarantor agrees, and Lender is hereby authorized, in the name of Guarantor, from time to time to file financing statements and continuation statements and to execute documents and to take such other actions as Lender deems necessary or appropriate to perfect, preserve and enforce its rights under this Guaranty.

MISCELLANEOUS PROVISIONS. The following miscellaneous provisions are a part of this Guaranty:

Amendments. This Guaranty, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Guaranty. No alteration of or amendment to this Guaranty shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.

Attorneys' Fees; Expenses. Guarantor agrees to pay upon demand all of Lender's costs and expenses, including Lender's attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Guaranty. Lender may hire or pay someone else to help enforce this Guaranty, and Guarantor shall pay the costs and expenses of such enforcement. Costs and expenses include Lender's attorneys' fees and legal expenses whether or not there is a lawsuit, including attorneys' fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), and appeals. Guarantor also shall pay all court costs and such additional fees as may be directed by the court.

Caption Headings. Caption headings in this Guaranty are for convenience purposes only and are not to be used to interpret or define the provisions of this Guaranty.

Governing Law. This Guaranty will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of Missouri without regard to its conflicts of law provisions.

Integration. **Guarantor further agrees that** Guarantor has read and fully understands the terms of this Guaranty; Guarantor has had the opportunity to be advised by Guarantor's attorney with respect to this Guaranty; the Guaranty fully reflects Guarantor's intentions and parol evidence is not required to interpret the terms of this Guaranty. Guarantor hereby indemnifies and holds Lender harmless from all losses, claims, damages, and costs (including Lender's attorneys' fees) suffered or incurred by Lender as a result of any breach by Guarantor of the warranties, representations and agreements of this paragraph.

Interpretation. In all cases where there is more than one Borrower or Guarantor, then all words used in this Guaranty in the singular shall be deemed to have been used in the plural where the context and construction so require; and where there is more than one Borrower named in this Guaranty or when this Guaranty is executed by more than one Guarantor, the words "Borrower" and "Guarantor" respectively shall mean all and any one or more of them. The words "Guarantor," "Borrower," and "Lender" include the heirs, successors, assigns, and transferees of each of them. All of the obligations of Guarantor under this Guaranty (if more than one Guarantor) shall be joint and several. If a court finds that any provision of this Guaranty is not valid or should not be enforced, that fact by itself will not mean that the rest of this Guaranty will not be valid or enforced. Therefore, a court will enforce the rest of the provisions of this Guaranty even if a provision of this Guaranty may be found to be invalid or

unenforceable. If any one or more of Borrower or Guarantor are corporations, partnerships, limited liability companies, or similar entities, it is not necessary for Lender to inquire into the powers of Borrower or Guarantor or of the officers, directors, partners, managers, or other agents acting or purporting to act on their behalf, and any indebtedness made or created in reliance upon the professed exercise of such powers shall be guaranteed under this Guaranty.

Notices. Any notice required to be given under this Guaranty shall be given in writing, and, except for revocation notices by Guarantor shall be effective when actually delivered, when actually received by telefacsimile (unless otherwise required by law), when deposited with a nationally recognized overnight courier, or, if mailed, when deposited in the United States mail, as first class, certified or registered mail postage prepaid, directed to the addresses shown near the beginning of this Guaranty. All revocation notices by Guarantor shall be in writing and shall be effective upon delivery to Lender as provided in the section of this Guaranty entitled "DURATION OF GUARANTY." Any party may change its address for notices under this Guaranty by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the party's address. For notice purposes, Guarantor agrees to keep Lender informed at all times of Guarantor's current address. Unless otherwise provided or required by law, if there is more than one Guarantor, any notice given by Lender to any Guarantor is deemed to be notice given to all Guarantors.

No Waiver by Lender. Lender shall not be deemed to have waived any rights under this Guaranty unless such waiver is given in writing and signed by Lender. No delay or omission on the part of Lender in exercising any right shall operate as a waiver of such right or any other right. A waiver by Lender of a provision of this Guaranty shall not prejudice or constitute a waiver of Lender's right otherwise to demand strict compliance with that provision or any other provision of this Guaranty. No prior waiver by Lender, nor any course of dealing between Lender and Guarantor, shall constitute a waiver of any of Lender's rights or of any of Guarantor's obligations as to any future transactions. Whenever the consent of Lender is required under this Guaranty, the granting of such consent by Lender in any instance shall not constitute continuing consent to subsequent instances where such consent is required and in all cases such consent may be granted or withheld in the sole discretion of Lender.

Successors and Assigns. This Guaranty shall be understood to be for the benefit of Lender and for such other person or persons as may from time to time become or be the holder or owner at any of the Indebtedness or any interest therein, and this Guaranty shall be transferable to the same extent and with the same force and effect as any such Indebtedness may be transferable.

DEFINITIONS. The following capitalized words and terms shall have the following meanings when used in this Guaranty. Unless specifically stated to the contrary, all references to dollar amounts shall mean

amounts in lawful money of the United States of America. Words and terms used in the singular shall include the plural, and the plural shall include the singular, as the context may require. Words and terms not otherwise defined in this Guaranty shall have the meanings attributed to such terms in the Uniform Commercial Code:

Borrower. The word "Borrower" means PHC Development LLC and includes all co-signers and co-makers signing the Note and all their successors and assigns.

Guarantor. The word "Guarantor" means everyone signing this Guaranty, including without limitation Janice A Patterson, and in each case, any signer's successors and assigns.

Guarantor's Share of the Indebtedness. The words "Guarantor's Share of the Indebtedness" mean Guarantor's indebtedness to Lender as more particularly described in this Guaranty.

Guaranty. The word "Guaranty" means this guaranty from Guarantor to Lender.

Indebtedness. The word "Indebtedness" means Borrower's indebtedness to Lender as more particularly described in this Guaranty.

Lender. The word "Lender" means Community Bank of Raymore, its successors and assigns.

Note. The word "Note" means and includes without limitation all of Borrower's promissory notes and/or credit agreements evidencing Borrower's loan obligations in favor of Lender, together with all

renewals of, extensions of, modifications of, refinancings of, consolidations of and substitutions for promissory notes or credit agreements.

Related Documents. The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, environmental agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness.

WAIVE JURY. Lender and Guarantor hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by either Lender or Guarantor against the other.

EACH UNDERSIGNED GUARANTOR ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS GUARANTY AND AGREES TO ITS TERMS. IN ADDITION, EACH GUARANTOR UNDERSTANDS THAT THIS GUARANTY IS EFFECTIVE UPON GUARANTOR'S EXECUTION AND DELIVERY OF THIS GUARANTY TO LENDER AND THAT THE GUARANTY WILL CONTINUE UNTIL TERMINATED IN THE MANNER SET FORTH IN THE SECTION TITLED "DURATION OF GUARANTY". NO FORMAL ACCEPTANCE BY LENDER IS NECESSARY TO MAKE THIS GUARANTY EFFECTIVE. THIS GUARANTY IS DATED MARCH 6, 2008.

GUARANTOR:

No. 14-520

In The
Supreme Court of the United States

VALERIE J. HAWKINS and
JANICE A. PATTERSON,

Petitioners,

v.

COMMUNITY BANK OF RAYMORE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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SUMMARY OF THE ARGUMENT

The Equal Credit Opportunity Act ("ECOA") makes it "unlawful for any creditor to discriminate against ***any applicant***, with respect to ***any aspect*** of a credit transaction." 15 U.S.C. § 1691 (emphasis added). ECOA's text fails to "speak with the precision necessary to say definitively" that "applicant" includes or excludes co-borrowers, co-makers, etc. *Cf. Mayo Found. for Med. Ed. & Research v. United States*, 562 U.S. 44, 53 (2011). ECOA leaves the precise question unanswered on where Congress definitively drew the line on this spectrum of credit relationships traditionally part of ECOA credit transactions. All these persons request and agree to repay the applied-for debt, but ECOA's text lacks the precision to definitively say who is an "applicant" and who is not.

Courts know all too well that "[t]hose who apply the rule to particular cases must of necessity expound and interpret that rule." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J.). The governing text's words convey by their surrounding context what the text means. *United States v. Great N. Ry. Co.*, 287 U.S. 144, 154 (1932) ("Thus far we have not traveled, in our search for the meaning of the lawmakers, beyond the borders of the statute." (Cardozo, J.)).

Yet, Community Bank of Raymore ("CBR") disregards the context in which words are used, violates basic interpretive canons, and ignores the conclusions those canons require. First, CBR advances an

unconventional, definite-indefinite-article interpretive rule. CBR urges that use of the definite article "the" unambiguously shows ECOA's text means a single "borrower-applicant." CBR overlooks the obvious: ECOA frequently uses indefinite articles, *i.e.* "an applicant," "any applicant," and the plural "applicants." CBR ignores that ECOA even uses the indefinite article "an" and the definite article "the" to modify "applicant" in the same sentence. 15 U.S.C. § 1691(e)(1). Simply put, CBR's urged position dangles, untethered by ECOA's text.

CBR uses this awkward definite-indefinite-article assertion to springboard grafting the word "borrower" onto the word "applicant," disregarding this Court's admonition that supplying words to a statute's text violates the Court's function. CBR understandably and rightly exhorts that statutes "mean what they say, and say what they mean." Yet, CBR omits from the refrain the equally important corollary that "a statute does not mean what it does not say."

Here, ECOA doesn't use the word "borrower" anywhere including to modify "applicant." ECOA does not mean something it does not say.

Next, CBR discards convention and urges the Court to adopt a radically new interpretive canon: isolating words from their surrounding context. Here, CBR proposes construction by isolation for "apply," "directly," and "credit." CBR's ungainly and unconventional offering urges the Court to determine ECOA's meaning by isolating words, divorcing them

from their context, and pedantically arguing their meaning from sterile dictionary definitions. This finds little support in any accepted interpretive canon.

Finally, CBR urges a holding limited to secondarily-liable guarantors, ignoring the seemingly infinite relationships common on ECOA's spectrum of credit transactions. These must be decided by future litigation resulting in much uncertainty. That is, CBR's pretext for its urged holding that this case must be decided narrowly on the basis of secondarily-liable guarantors (ignoring CBR's own admission that the Wives here are primarily, absolutely, and unconditionally-liable) fails to explain how its proposed ECOA reading will be applied to co-borrowers, co-makers, co-signers, etc. Is a wife who is required to sign as a "co-borrower" or "co-maker" of a note for her husband's separate business an "applicant" under CBR's proposed narrow "borrower-applicant" ECOA reading? There is no serious argument here – she must be as urged under CBR's "borrower-applicant" construction.

And how does the illegally-required, co-borrower wife's position differ from Valerie Hawkins' position? Both are liable to repay the applied-for debt without the lender seeking recourse from any other person or any collateral. To state the obvious, there is no difference.

Yet, by slicing the distinctions as thin as CBR urges, the nagging question remains: where is the

objective ECOA text showing the co-borrower wife is an "applicant" as CBR urges she must be, but the "primarily, absolutely, and unconditionally liable" wife is not? Congress failed to wield the ECOA text with the precision required to slice the distinctions as razor-thin as CBR suggests. In fact, CBR points to no ECOA text showing where Congress precisely and definitively intended to draw the line. There is no such ECOA text. It simply is not there.

The fact is, the number of interrelated contractual obligations traditional in any given ECOA credit transaction is only limited by the parties' ingenuity to create them. Congress provided no precise answer to the question on where to draw that line.

The Federal Reserve Board ("FRB") reasonably rejected a fact-intensive, case-by-case inquiry in favor of a rule that treats all guarantors and similar parties as "applicants" for purposes of the Additional Parties Rule, providing clarity for creditors and consumers. Yet, CBR suggests that the Wives and the Government are claiming "a wide-ranging and virtually unlimited class of anyone and everyone who might in some way be connected to the lending transaction." Respondent's Brief at 14. CBR's rhetoric overstates the case: the Wives and the Government only advocate the clarity and predictability provided by Regulation B for the last thirty years.

What CBR proposes in their narrow, secondarily-liable guarantor holding is "a recipe for uncertainty, unpredictability, and endless litigation." *United*

States v. Mead Corp., 533 U.S. 218, 250 (2011) (Scalia, J., dissenting). This Court should "have none of it." *Id.* at 249.

ARGUMENT

A. CBR's untenable definite-indefinite-article interpretive rule urging the Court to rewrite ECOA to mean "borrower-applicant" collapses under the weight CBR thrusts on it.

1. Courts determining a statute's meaning refuse to graft words onto a statute's text. CBR urges this Court to graft the word "borrower" onto ECOA's "applicant" definition, rewriting the text to say "borrower-applicant."

This Court's function does not include "engraft[ing] on a statute additions which [the Court] think[s] the legislature logically might or should have made." *United States v. Cooper Corp.*, 312 U.S. 600, 605 (1941) *superseded by statute on other grounds as recognized in U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 736 (2004). CBR ignores that courts may not add to what the statute's text states or reasonably implies. Matters the statute does not cover are simply not covered. *F.T.C. v. Simplicity Pattern Co.*, 360 U.S. 55, 67 (1959).

Here, CBR urges the Court to do just what the Court says it won't do by repeatedly arguing that

Congress intended "applicant" to mean "borrower-applicant." *See, e.g.*, Respondent's Brief at 24 ("Certainly, the borrower-applicant is the individual or entity that 'applies' 'directly' for 'credit'. ."); *id.* at 26 (referring to "an 'applicant,' *i.e.*, a borrower"); *id.* at 30 ("[T]he ECOA contemplates that there often, if not usually, will be a single applicant-borrower. .").

Yet, ECOA failed to precisely restrict "applicants" to a single "borrower." ECOA never even uses the word "borrower." The "plain text of the statute" does not "'speak[ ] with the precision necessary to say definitively'" that "applicant" is limited to only the "borrower." *See Mayo*, 562 U.S. at 53 (quoting *United States v. Eurodif S.A.*, 555 U.S. 305, 319 (2009)). Nevertheless, CBR invites this Court to graft onto ECOA a term Congress did not use, but which CBR believes "logically might or should have" been used to redefine "applicants."

2. Statutory words importing the singular include and apply to multiple persons. ECOA uses "the applicant," "applicants," "an applicant," "any applicants," and "each applicant" in the same subsections and sometimes even in the same sentence. ECOA's broadly-defined "applicant" does not mean a single borrower-applicant.

CBR claims ECOA's references to "the applicant" (using a definite "singular article") as opposed to plural "applicants" (or ECOA's use of indefinite articles)

shows ECOA only protects a single borrower-applicant. *See* Respondent's Brief at 30. CBR's urgings violate the Dictionary Act and ignore common sense.

The Dictionary Act, 1 U.S.C. § 1, states "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise – words importing the singular include and apply to several persons, parties, or things." ECOA's linguistic context shows no intention that by using a "definite" article such as "the" means only one "borrower-applicant" is protected. Multiple persons may be an ECOA credit "applicant" in any one transaction. *See* 15 U.S.C. § 1691(a).

Obviously, two individuals jointly owning a business without forming a corporation or limited liability company and "applying" for a single loan may sign as co-borrowers. Both qualify as "applicants." Other examples include a business owner who signs a limited liability company's note as co-borrower. She also qualifies as an "applicant."

Under either circumstance and countless others, "several persons, parties, or things" qualify as "any person who applies to a creditor directly for an extension, renewal, or continuation of credit." Accepting CBR's unnatural ECOA reading means only one "borrower-applicant" possesses standing to sue when "several persons, parties, or things" constitute co-borrowers, co-makers, etc., who requested credit and agreed to repay the applied-for debt.

Yet, CBR persists asserting that ECOA refers to "the applicant" in "almost every instance." ECOA uses the term "applicant" (or "applicants") fifty-two times. While ECOA refers to "the applicant" twenty-eight times, it uses "an applicant" (eleven occasions), "any applicant" (seven occasions), "each applicant" (once), and "applicants" (four occasions). Indeed, ECOA frequently uses indefinite articles to describe any "applicant" such as ECOA's chief provision prohibiting discrimination against "any applicant," and not "the applicant." 15 U.S.C. § 1691(a). ECOA even uses definite and indefinite articles to modify "applicant" in the same sentence. *See* § 1691(e)(1).

Likewise, ECOA uses the same definite and indefinite article mix with the term "creditor." ECOA uses "any creditor" (four times), "a creditor" (fifteen times), "the creditor" (seventeen times), and "each creditor" (once). Courts have held that any single ECOA credit transaction can include more than one creditor. *See United States v. Am. Future Sys., Inc.*, 743 F.2d 169, 182 (3d Cir. 1984) (affirming district court holding that a creditor company's wholly-owned subsidiary and chief operating officer were both ECOA "creditors").

Clearly, ECOA's text leaves CBR's urged, definite-article, "borrower-applicant" conclusion dangling without ECOA textual support. ECOA's text does not use "the applicant" in "almost every instance." Rather, ECOA's indefinite articles and references to plural "applicants" show more than one person

qualifies as an ECOA applicant under any single credit transaction.

3. Congress made it "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction." Congress placed no limits on ECOA standing to a singular applicant.

Congress stated "[i]t shall be unlawful for any creditor to discriminate against *any* applicant, with respect to *any* aspect of a credit transaction." 15 U.S.C. § 1691(a) (emphasis added). CBR admits "[t]here will always be *at least one* 'applicant' in *every* lending transaction, and that 'applicant' can always assert an ECOA claim if a lender discriminates on a prohibited basis." Respondent's Brief at 15 (first emphasis added).

ECOA's text did not precisely say unlawful acts under 15 U.S.C. § 1691(a) occur against "the" applicant, "an" applicant, "the borrower-applicant," or only "one" applicant. ECOA broadly prohibits discrimination against "*any* applicant, with respect to *any* aspect of a credit transaction." § 1691(a) (emphasis added). CBR insists that only "the aggrieved applicant" may bring a claim for actual and punitive damages and that this means only the singular "borrower-applicant." Respondent's Brief at 32. But this language is also consistent with the conclusion that any one credit transaction contains more than one applicant – some may be aggrieved and some

may not. Only "the aggrieved applicant" may pursue claims.

The text CBR clings to simply lacks the precision required to say definitively there is only one applicant per credit transaction. Congress chose language too blunt to answer the precise question on whether spouses are definitively excluded from ECOA's protection as "applicants" when they sign as co-borrowers, co-makers, co-signers, guarantors, etc. The Court deplores being asked to file down Congress's blunt instruments to make them more useful to one parties' liking. This case presents no exception.

B. CBR's construction by isolation ignores the context of "applies," "directly," and "credit."

1. Isolating words from their surrounding context distorts a statute's meaning. Yet, CBR urges isolating words and ignoring their context. CBR's narrow reading overlooks that "directly" is modified by the phrase "for an extension, renewal, or continuation of credit," turning a blind eye to the Wives' position at each loan renewal.

A "fundamental principle of statutory construction (and, indeed, of language itself) [is] that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 131 (1993);

see also King v. Burwell, 135 S. Ct. 2480, 2489-90 (2015).

Yet, CBR implores a narrow ECOA definition of "applicant" by isolating "applies," "credit," and "directly." *See, e.g.*, Respondent's Brief at 17, 18, 19. Indeed the Court knows all too well, for instance, that context determines whether the word "sharp" describes the cutting razor's edge, the manner in which one is dressed, or a keen intellect on display. Likewise, quarantining ECOA's words to determine its meaning ignores the context provided by the entire definition:

> The term "applicant" means any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit.

15 U.S.C. § 1691a(b).

Here, ECOA clarifies who the "persons" are that comprise applicants by the first phrase "who applies to a creditor directly." Similarly, ECOA further modifies who these persons are with the second phrase "for an extension, renewal, or continuation of credit."

2. Primarily, absolutely, and unconditionally liable guarantors "appl[y] to a creditor directly" upon "renewal" or "continuation" of the guaranteed debt.

As stated, ECOA's text "who applies to a creditor directly" is further modified by "for an extension,

renewal, or continuation of credit." 15 U.S.C. § 1691a(b). Thus, "applicant" covers a time continuum not limited temporally to those "persons" who applied only at the initial credit extension. Just as there is a spectrum of "persons" traditionally involved in ECOA credit transactions, there is a time continuum over which ECOA violations can occur: (1) initial extensions, (2) renewals, or (3) continuations of credit. That is, the time continuum includes, for example, a discriminatory credit decision denying the initial extension of credit or granting credit on discriminatory terms. It can also later include renewing or continuing credit on the same discriminatory terms or different discriminatory terms.

For instance, racial minorities initially granted credit at higher interest rates than non-minorities based on race still suffer credit discrimination. If the credit is then "renewed" or "continued" on different discriminatory terms such as requiring more collateral, a separate discriminatory act occurs at renewal.

Obviously, "persons" applying for credit "renewals" are also "applicants" who can suffer discrimination. By way of further example, if a loan matures unpaid, a primarily, absolutely, and unconditionally liable guarantor faces two options: (1) pay the debt, or (2) seek a renewal or continuation. ECOA's protected "applicants" includes guarantors seeking renewal. That is, a guarantor facing repayment after maturity who seeks renewal to avoid paying the debt necessarily "applies to a creditor directly for a[ ] renewal[ ] or continuation of credit." § 1691a(b). Simply stated,

even if a guarantor is deemed not an "applicant" at the loan's inception, a guarantor unmistakably "applies to a creditor directly for a[ ] renewal[ ] or continuation of credit" when the guarantor seeks a renewal to avoid repaying after maturity.

Here, PHC's loans often matured before CBR approved any renewal. At these renewals, Valerie Hawkins, who CBR claims is "primarily and unconditionally" liable for over $2 million, certainly wanted "an extension, renewal, or continuation of credit," just not on discriminatory terms. § 1691a(b). As a primarily and unconditionally liable spousal guarantor after maturity, Valerie Hawkins encountered marital discrimination violating the Additional Parties Rule by automatically requiring her guaranty. Obviously, spousal guarantors make an "appeal" or "request" "of benefit" to the spousal guarantor at such post-maturity renewals.

3. ECOA's own text must be used to interpret the statute. Under ECOA's definition of "credit," a guarantor-debtor is any "person who applies to a creditor directly."

In analyzing the first phrase "who applies to a creditor directly," we must note that "applies" and "directly" are not defined terms, but ECOA does define "creditor." ECOA defines "creditor" as "any person who regularly extends, renews, or continues credit." § 1691a(e). Thus, those "persons" who are

"applicants" includes persons who seek to reach, or in fact reach, agreements to repay the applied-for debt with "creditors."

The meaning of "credit" provides guidance on those "persons" who are "applicants." Under ECOA, the relevant definition of "credit" is "the right granted by a creditor ***to a debtor*** to defer payment of debt or to incur debts and defer its payment." § 1691a(d) (emphasis added). "Debtor" is not defined by ECOA, but use of the statutory and common law terms "debtor" helps define the scope of both "applicant" and "credit."

Black's Law Dictionary in effect at ECOA's enactment defined debtor as "[o]ne who owes a debt; he who may be compelled to pay a claim or demand. Anyone liable on a claim, whether due or to become due." BLACK'S LAW DICTIONARY (rev. 4th ed. 1968); *see also* WEBSTER'S THIRD NEW INT'L DICTIONARY (1965) (defining "debtor" as "one indebted to another"; "one under obligation to another"; and "one owing money to another"). Here, Guarantors are one of many "persons" who "owe a debt," who "may be compelled to pay a claim," or who "are liable on a claim," as alleged in CBR's counterclaims to collect. Guarantors, like co-borrowers, co-makers, endorsers, etc., all agree to repay the applied-for debts.

A statute using an undefined common law term utilizes the term's common law meaning. *See, e.g.*, *Neder v. United States*, 527 U.S. 1, 23 (1999); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322

(1992). Here, absent an express contrary intent, ECOA failed to alter the common law meaning of "debtor." Primarily-liable spousal guarantors are common law "debtors" and, using ECOA definitions, "debtors" who requested and agreed to repay the applied-for credit. ECOA's text fails to precisely and definitively exclude guarantors from being applicants.

4. Construction by isolation of the word "apply" disregards that courts assume the ordinary meaning of the language accurately expresses legislative purpose. The ordinary definition of "apply" is not restricted to someone who requests something only for his or her own benefit.

In construing a statute, courts assume the ordinary meaning of statutory language accurately expresses legislative purpose. *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1172 (2013). CBR urges a guarantor cannot be an ECOA "applicant" because a guarantor "neither 'applies' for nor obtains 'credit' for itself." *See* Respondent's Brief at 14.

First, the ordinary meaning of "apply" does not exclude requests for benefits to others. Most standard definitions omit that limitation. *See* Brief for the United States at 18 (collecting dictionary definitions of "apply"). Even the dictionary cited in the Eighth Circuit's concurrence specifies only that the term "usu[ally]" refers to a request for something that benefits the requester – not that the relevant

meaning excludes requests that benefit someone else. WEBSTER'S THIRD NEW INT'L DICTIONARY 105 (1971). And, as the Government points out, even if it supported a more restrictive interpretation, a single dictionary could not demonstrate that ECOA *unambiguously* excludes a broader meaning. To the contrary, "[t]he existence of alternative dictionary definitions , each making some sense under the statute, itself indicates that the statute is open to interpretation." *Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 418 (1992).

Yet, CBR persists in quoting the 1965, 1973, and 1981 versions of Webster's Third New International Dictionary entries for "apply": "to make an appeal or a request esp. formally and often in writing and ***usu.*** for something *of benefit to oneself.*" Respondent's Brief at 23-24 (first emphasis added). Although CBR highlights the "benefit" language, CBR ignores "usu."

The cited dictionaries did not define "apply" as "to make an appeal or a request for something of benefit to oneself." Instead, they specifically indicated that "to apply" ***usually*** means to request something for one's benefit. Obviously one can ***sometimes*** "apply" even though one does not seek something of benefit to oneself.

Moreover, Regulation B would be a permissible interpretation of "applicant" even if the term encompassed only an individual who requests something to

benefit herself.[1] As the Eighth Circuit recognized, guarantors typically offer a guarantee precisely because they "desire[ ] for a lender to extend credit to a borrower." Pet. App. 6-7. As claimed by CBR, the guarantees in this case for example, stated that petitioners "expect[ed] to derive substantial benefits" from the loans. Doc. 4-1, at 24, 27 (Exhibits D and E to *Community Bank of Raymore's Counterclaims for Breach of Guarantees* at 24, 27). CBR thus must limit

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[1] CBR suggests that the FRB took a "180-degree turn from the position the FRB adopted in both 1975 and 1976." Respondent's Brief at 41. CBR misapprehends the FRB's actions. As noted by the Government, 1975 Regulation B simply repeated ECOA's statutory definition of "applicant" "without explicitly addressing the status of guarantors." Brief for the United States at 6. The 1976 Regulation B "added a substantive provision indicating that the term included 'an applicant who is secondarily liable such as an endorser, co-maker . . . or guarantor.'" *Id.* at 6-7 (discussing notice requirements).

CBR ignores that since 1977, Regulation B "has recognized that a creditor engages in discrimination prohibited by the Additional Parties Rule and ECOA when it improperly requires an individual to guarantee or cosign her spouse's debt obligations – both when the primary borrower is the spouse and when the primary borrower is instead a business owned or operated by the spouse." *Id.* at 6. The 1985 Regulation B amendment shows the FRB intended to resolve unresolved ECOA questions stating that it "clarified that violation of [the Additional Parties Rule] constitute[s] discrimination not only against the primary borrower, but also against the guarantor spouse." *Id.* at 8-9.

Clarifying who can seek relief for a creditor's discriminatory conduct is hardly an "about face." Rather, FRB's clarifying amendment was a permissible exercise of FRB's Congressionally delegated authority to "elucidate a specific provision of [ECOA] by regulation." *Mead*, 533 U.S. at 227 (internal citation omitted).

the term "apply" further: it is not enough that an individual requests an extension of credit that will benefit her; she must also *receive* the credit herself. But CBR cited no authority supporting that further limitation.

Moreover, there is no serious argument that a guarantor who, at maturity, seeks a "renewal" or "continuation" of his or her obligations to pay the applied-for debt is seeking "something of benefit to" the guarantor. At maturity, the guarantor has an obligation to repay the debt; the renewal sought by the guarantor gives her the option to repay the debt at a later date. Clearly, the "renewal" is a benefit to the guarantor.

There also is no serious dispute that some guarantors do seek something of benefit to themselves at the loan's initiation. For instance, where an LLC or other entity borrows money for business purposes, the entity's owners who are required to guaranty the loan seek something of benefit to them.

It has long been recognized a guarantor requests the extension of credit to the borrower. 38A C.J.S. *Guaranty* § 26 (2006); *see* 1 Joseph M. Perrillo, Corbin on Contracts § 3.14, at 381 (rev. ed. 1993) ("In most cases of guaranty contracts, the offer comes from the guarantor requesting the giving of credit to a principal debtor."). Here, that is precisely what happened:

- Prior to the March 31, 2005, initial credit extension, PHC had no assets, no prior income history, no credit history. It was a

new start-up business just recently formed. Doc. 79-17 at 50-51 (Exhibit 5 to *Plaintiffs' Suggestions in Opposition to Defendant's Motion for Summary Judgment on Its Counterclaims for Breach of Guaranties & Plaintiffs' Affirmative Defenses* at 185:3-13, 190:4-19).

- CBR only relied on the Guarantors' credit history, assets, and prior earnings to underwrite the initial credit extension. *See* Doc. 79-7 at 3.
- CBR required no collateral from PHC, but only took a security interest in the Guarantors' collateral. Doc. 79-13 at 14-23.

There is no serious argument that PHC had nothing upon which to realistically base a credit request. The real request came from its owners Chris Patterson (as trustee), and Gary Hawkins, both guarantors.

Simply put, CBR's construction by isolation of the word "applies" is unworkable at best. It leaves the Court with pedantic choices from sterile dictionary definitions divorced from ECOA's context. Even under CBR's clinical, sterile dictionary definitions, the Court must reach the untenable conclusion that guarantors never "apply" for credit ("making an appeal or request") where the guarantor-owners of a start-up business "*usually*," for their own benefit, offer their personal credit histories, income, and assets to support the applied-for debt because the

start-up "borrower" has no such information, history, or assets.

CBR again has invited this Court to cross the threshold into the absurd, and engage in a linguistic wordplay to rewrite ECOA's text which the Court deplores. Here, the Court has sufficient interpretive tools defining the strike zone to make the call on whether Congress definitively answered the precise question on who is and who is not an applicant. Simply put, CBR has thrown a wild pitch with its construction by isolation of the word "apply." There is no reason through linguistic license to call it a strike.

5. General words are not to be arbitrarily limited, but given their general meaning and effect. Literally construing isolated words can "strangle meaning."

General words are not to be arbitrarily limited but given their general meaning and effect. For instance, the Eighth Circuit determined that "any property" included real property in a federal statute that provides for the seizure of "[a]ny property, including money" used in gambling operations. *See United States v. S. Half of Lot 7 & Lot 8, Block 14, Kountze's 3rd Addition to City of Omaha*, 910 F.2d 488, 489 (8th Cir. 1990).

This canon applies even where the legislature may have enacted a law with a particular intent but used general terms to accomplish that intent. *See, e.g., Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72

(1872) ("Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter."). Similarly, in *Oncale v. Sundowner Offshore Servs., Inc.*, this Court determined whether 42 U.S.C. § 2000e-2(a)(1) prohibited male-on-male sexual discrimination finding that the statute does prohibit this conduct, even though male-on-male discrimination "was assuredly not the principal evil Congress was concerned with when it enacted Title VII." 523 U.S. 75, 79 (1998).

"But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.* "All construction is the ascertainment of meaning. And literalness may strangle meaning." *Utah Junk Co. v. Porter*, 328 U.S. 39, 44 (1946). Indeed, "a sterile literalism loses sight of the forest for the trees." *See New York Trust Co. v. Comm'r of Internal Revenue*, 68 F.2d 19, 20 (2d Cir. 1933) (Hand, J.). Here, Congress used the general words "applicant" and "applies" and there is no textual basis to arbitrarily limit them to "borrowers" only.

6. CBR's urged holding does nothing to answer the second disjunctive under ECOA's applicant definition where an applicant applies "indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit."

CBR's construction by isolation also provides an oblique, nondescript definition of "directly," failing to analyze how this clinical review guides any firm conclusions that ECOA's text definitively says there is only one "borrower-applicant" for each ECOA credit transaction. Just as conspicuously absent from CBR's argument is any analysis of the second disjunctive under § 1691a(b)'s definition of "applicant" which provides "or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit."

ECOA's second disjunctive differs in two ways from the first: (1) applying to a creditor "indirectly" as opposed to "directly"; and (2) use of an existing credit plan seeking an increased credit limit, not an initial extension or subsequent renewal. CBR provides the Court with no guidance on how its urged narrow holding that ECOA's text precisely and definitively excludes secondarily-liable guarantors as applicants under the first disjunctive can be squared with the second disjunctive's text.

For instance, when an LLC has a previously-established credit plan with an established limit guaranteed by the owners, and the LLC and its

guarantor-owners request the credit limit be increased, are the guarantor-owners applying "indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit" so as to be applicants? Would such guarantor-owners meet the Eighth Circuit's "sufficiently involved" threshold? Are such guarantor-owners "directly" or "indirectly" involved in such a request? If neither directly nor indirectly involved, then how are they involved?

CBR's vague reference to the word "directly" and complete silence on the second disjunctive regarding who applies "indirectly" leaves its proposed holding untethered to ECOA's text. Neither the Eighth Circuit nor CBR offers any guidance to assist bankers, customers, and the courts as to what involvement qualifies a person as "directly" or "indirectly" applying under ECOA.

CBR's proposed holding that ECOA precisely and definitively states that secondarily-liable guarantors are not applicants under the first disjunctive requires the Court to wade into waters that have a very powerful undercurrent, likely to pull under the superficial pretext offered as holding by CBR. Reaching the narrow secondarily-liable guarantor holding urged by CBR will only leave the lower courts drowning in fact-intensive lawsuits determining who are applicants under the first disjunctive, scratching their heads trying to apply an unworkable rule, and at a loss on how "applicant" under the first disjunctive

may guide who is an applicant under the second disjunctive.[2]

This Court traditionally grants certiorari when important issues are raised concerning a federal statute's scope. *See Arroyo v. United States*, 359 U.S. 419, 421 (1959); *Palermo v. United States*, 360 U.S. 343, 345 (1959); *Layne & Bowler Corp. v. W. Well Works, Inc.*, 261 U.S. 387, 393 (1923) (granting review is proper in "cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties"). Here, answering the artificially-narrow question CBR poses accomplishes nothing. The clarity and predictability offered by Regulation B is much preferred.

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[2] CBR's unfounded "vistas of liability" argument relying on *dicta* from *Moran Foods, Inc. v. Mid-Atl. Mkt. Dev. Co.*, 476 F.3d 436 (7th Cir. 2007) pales in comparison to the litigation that will be unleashed by rejecting the clarity and predictability offered by Regulation B. More importantly, Regulation B provides legal means for a lender underwriting a loan to obtain security from a non-owner spouse without violating the Additional Parties Rule thus ameliorating policy concerns raised by community bankers. *See* 12 C.F.R. § 202.7(d)(4).

C. CBR's urged holding limited to secondarily-liable guarantors is inapposite to the facts presented here and only unleashes a storm of litigation which will follow the uncertainty and unpredictability caused by such a holding.

Creditors often require spouses to sign loan documents in capacities other than guarantor such as a co-borrower, co-maker, co-signer, endorser, or as a "similar party." 12 C.F.R. § 202.2(e). The possible credit relationships spouses assume are limited only by the imagination employed to draft the papers. CBR's urged secondarily-liable guarantor holding breeds uncertainty inviting extensive future litigation.[3]

CBR admits that the Wives signed "absolute and unconditional" guaranties. *See* Respondent's Brief at 3-4. Despite its admission, CBR asks this Court to find the Wives are not "applicants" because secondarily-liable guarantors cannot qualify as "applicants." *See*

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[3] CBR urges the Court to adopt an unduly narrow view of the issues presented, ignoring that even if the Court determines that spousal guarantors do not have standing under ECOA to bring claims, spousal guarantors could challenge the illegality of their guaranties through traditional declaratory actions.

That is, CBR has not challenged the Additional Parties Rule. Thus, regardless of whether spousal guarantors have ECOA standing as applicants, requiring spousal guaranties violates ECOA. *See, e.g.*, Brief for the United States at 6. Such guaranties are unenforceable as illegal, and the would-be guarantor could assert such illegality as a defense, whether in response to a claim to enforce the guaranty or affirmatively as a declaratory action. *See* 28 U.S.C. § 2201(a).

id. at 26-27. CBR's urged holding is so narrow it would not even resolve this case.

To that end, CBR ignores the seemingly infinite relationships common on ECOA's spectrum of credit transactions. That is, CBR's pretext for its urged holding on the basis of secondarily-liable guarantors fails to explain how its proposed ECOA reading will be applied to co-borrowers, co-makers, co-signers, etc. As previously queried, is a wife who is required to sign as a "co-borrower" of a note for her husband's separate business an "applicant" under CBR's proposed narrow "borrower-applicant" ECOA reading? There is no serious argument here – she must be as urged under CBR's "borrower-applicant" construction.

And how does the illegally-required, co-borrower wife's position differ from Valerie Hawkins' position? Both are liable to repay the applied-for debt without the lender seeking recourse from any other person or any collateral. To state the obvious, there is no difference.

Yet, by slicing the distinctions as thin as CBR urges, the nagging question remains: where is the objective ECOA text showing the co-borrower wife is an "applicant" as CBR urges she must be, but the "primarily, absolutely, and unconditionally liable" wife is not? Simply put, no such ECOA text exists.

The FRB reasonably rejected a fact-intensive, case-by-case inquiry in favor of a rule that treats all guarantors and similar parties as "applicants" for

purposes of the Additional Parties Rule. That approach provides clarity for creditors and consumers, which is especially important given the number and variety of transactions covered by ECOA.

CONCLUSION

CBR places its proposed narrow holding on a three-legged stool which cannot bear the extraordinary weight placed on it. First, the definite-indefinite-article leg is untethered by ECOA's text, leaving CBR's graft of the word "borrower" onto ECOA's "applicant" untenable. Second, construction by isolation of the word "applies" ignores ECOA's context, particularly the Wives' position at renewal and leaves this Court only with a pedantic reading of one dictionary definition to reach an untenable conclusion that some guarantors seeking a benefit to themselves are applicants, but others less involved may not be.

But the third leg of the stool is so wobbly the stool cannot even bear its own weight. That is, CBR's proposed, narrow, secondarily-liable-guarantor holding does nothing to resolve the instant case and only unleashes a flood of lawsuits to drown the lower courts who will be scratching their heads on how to decide them. Regulation B's Additional Parties Rule providing clarity and predictability for over thirty years is a reasonable interpretation of ECOA's broad language which does not precisely or definitively say

spousal co-borrowers, co-signers, guarantors, etc., are not "applicants."

For the foregoing reasons and those articulated in Petitioners' merits brief, Petitioners request this Court reverse the Eighth Circuit's holding that ECOA's definition of "applicant" unambiguously excludes guarantors, and reverse the District Court's ruling in all respects including that Petitioners have no standing to seek ECOA civil remedies and defenses such as challenging the Guaranties' legality. Petitioners also request remand of this proceeding to the District Court for resolution on the merits.

Respectfully submitted,

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The Equal Credit Opportunity Act (ECOA) makes it unlawful for "any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction," on the basis of prohibited characteristics including sex and marital status. 15 U.S.C. 1691(a). Since 1985, regulations promulgated by the Board of Governors of the Federal Reserve System and the Consumer Financial Protection Bureau have provided that, for certain purposes, the "applicants" protected from discrimination under the Act include guarantors and other secondary obligors. The question presented is as follows:

Whether the regulations issued by the Board and the Bureau permissibly interpret ECOA's definition of "applicant" to encompass guarantors.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The Consumer Financial Protection Bureau (CFPB or Bureau) is authorized to promulgate regulations implementing the Equal Credit Opportunity Act (ECOA or Act), 15 U.S.C. 1691 *et seq.* See 15 U.S.C. 1691b(a). One of those regulations provides that, for certain purposes, the "applicants" protected under the Act include guarantors. 12 C.F.R. 1002.2(e). The validity of that regulation is directly at issue here. In addition, the Bureau, the Department of Justice (DOJ), and other federal agencies are responsible for enforcing the Act through administrative proceedings and litigation. 15 U.S.C. 1691c, 1691e(g) and (h). The United States therefore has a substantial interest in the Court's resolution of the question presented.

STATEMENT

This case involves a challenge to a longstanding regulation implementing the Equal Credit Opportunity Act's prohibition against discrimination on the basis of marital status. The regulation recognizes that when a creditor requires an individual to guarantee her spouse's debt obligation solely because the couple is married, both the primary borrower and the guarantor spouse qualify as "applicants" who suffer discrimination in violation of the Act.

A. The Equal Credit Opportunity Act And Regulation B

Congress enacted ECOA in 1974 in response to "widespread discrimination on the basis of sex and marital status in the granting of credit to women." S. Rep. No. 278, 93d Cong., 1st Sess. 16 (1973) (Senate Report). The "clear pattern" of discrimination by creditors included, among other practices, holding women to different standards of creditworthiness, discounting married women's income, and refusing to grant individual credit to married persons. *Id.* at 16-17. The Act sought to eliminate those practices and to make credit "equally available to all creditworthy customers without regard to sex or marital status." ECOA, Pub. L. No. 93-495, § 502, 88 Stat. 1521.

In 1976, Congress amended ECOA to prohibit discrimination on additional grounds. ECOA Amendments of 1976, Pub. L. No. 94-239, § 2, 90 Stat. 251-252. As amended, the Act makes it unlawful "for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction" on the basis of characteristics including "race, color, religion, national origin, sex or marital status, [and] age." 15 U.S.C. 1691(a). The Act defines an "applicant" as "any person who applies to a creditor directly for an

extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit." 15 U.S.C. 1691a(b).

Congress gave the Board of Governors of the Federal Reserve System (Board) broad authority to "prescribe regulations to carry out the purposes of [ECOA]." 15 U.S.C. 1691b(a) (2006). The Board exercised that authority by promulgating rules known as "Regulation B." 12 C.F.R. Pt. 202 (2010). In 2010, Congress transferred the Board's rulemaking authority to the CFPB. 15 U.S.C. 1691b(a).[1] The Bureau has now repromulgated Regulation B and the accompanying Official Interpretations without material change. 12 C.F.R. Pt. 1002 & Supp. I; see 76 Fed. Reg. 79,442 (Dec. 21, 2011).[2]

If a creditor violates ECOA or Regulation B, an "aggrieved applicant" may bring a suit seeking actual damages, punitive damages, and equitable or declaratory relief. 15 U.S.C. 1691e(a)-(c); see 15 U.S.C. 1691a(g). In addition, the CFPB, DOJ, and other federal agencies have the authority to enforce the Act through administrative proceedings and litigation. 15 U.S.C. 1691c, 1691e(g) and (h).

B. The Additional Parties Rule

This case involves Regulation B's Additional Parties Rule (Rule), 12 C.F.R. 202.7(d) (2010), which gov-

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[1] Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, §§ 1061(b)(1) and (d), 1085, 124 Stat. 2036, 2039, 2083-2085.

[2] Because the relevant events in this case occurred before the Bureau repromulgated Regulation B, this brief cites the Board's regulations and Official Staff Interpretations, 12 C.F.R. Pt. 202 & Supp. I (2010).

erns the circumstances under which a creditor may require a borrower to provide a signature from another person, including a guarantor, surety, cosigner, or similar party.

1. Guarantors, sureties, and cosigners are secondary obligors who assume liability on a loan provided for another person's use in order to induce the creditor to make the loan. Their duties are defined by the terms of their agreements with creditors and by applicable state law. In general, however, a surety or cosigner is "jointly and severally liable with the principal obligor," whereas a guarantor becomes liable only "upon default of the principal obligor." Restatement (Third) of Suretyship & Guaranty § 15(a), (c), and (d) (1996) (Restatement of Guaranty); see 23 Richard A. Lord, *Williston on Contracts* § 61:2, at 8-12 (4th ed. 2002).

2. Since its inception in 1975, Regulation B has included an Additional Parties Rule prohibiting creditors from automatically requiring spouses to assume liability for each other's debt obligations. 12 C.F.R. 202.7(d) (2010); see 40 Fed. Reg. 49,308-49,309 (Oct. 22, 1975). The Rule targets one of the core forms of marital-status discrimination that ECOA sought to end. Before the Act, some creditors refused to lend to married women "without their husbands' signatures." Senate Report 17. Others imposed the same requirement on married people of both sexes. *Id.* at 17-18. Indeed, "[i]n some segments of the credit industry, it [wa]s common practice to ask every married person * * * to obtain the signature of his or her spouse." Anne J. Geary, *Equal Credit Opportunity—An Analysis of Regulation B*, 31 Bus. Law. 1641, 1652 (1976) (Geary). Such requirements created extra

obstacles for married people seeking credit and made it impossible for them to maintain separate credit histories. Senate Report 17-20.

The Additional Parties Rule provides that if an applicant for individual credit satisfies "the creditor's standards of creditworthiness," the creditor generally may not "require the signature of [that] applicant's spouse or other person." 12 C.F.R. 202.7(d)(1) (2010).[3] If the creditor's lending standards require "the personal liability of an additional party" to provide adequate assurances of repayment, the creditor may "request a cosigner, guarantor, endorser, or similar party." 12 C.F.R. 202.7(d)(5) (2010). But the creditor may not "require that the [primary borrower's] spouse be the additional party." *Ibid.* The Rule thus ensures that married persons are able to obtain credit on the same terms as similarly situated unmarried persons and to maintain independent credit histories.

Since 1977, the Additional Parties Rule has also barred a creditor from "impos[ing] requirements upon an additional party that the creditor is prohibited from imposing upon an applicant" under the Rule. 12 C.F.R. 202.7(d)(6) (2010); see 42 Fed. Reg. 1247, 1256 (Jan. 6, 1977). That provision has particular relevance for small business loans such as those at issue in this case. Creditors can, and routinely do, require personal guarantees from the officers or owners of small

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[3] The Rule provides exceptions when an applicant relies on community or jointly owned property to satisfy the creditor's lending standards. 12 C.F.R. 202.7(d)(2)-(4) (2010). In such circumstances, the creditor may not require the applicant's spouse or the joint owner of the property to become personally liable for the debt, but may require that person's signature on an instrument making the property available to the creditor in the event of a default. *Ibid.*

businesses seeking credit. 12 C.F.R. Pt. 202, Supp. I, ¶ 7(d)(6)-1 (2010); see Marshall E. Tracht, *Insider Guaranties in Bankruptcy: A Framework for Analysis*, 54 U. Miami L. Rev. 497, 517 (2000). Under Section 202.7(d)(6), creditors that require such guarantees "may not automatically require that the spouses of married officers also sign the guarantee." 12 C.F.R. Pt. 202, Supp. I, ¶ 7(d)(6)-2 (2010). Rather, a creditor may require additional signatures only subject to the rules that apply to signature requirements imposed on primary borrowers. *Ibid.*; see 42 Fed. Reg. at 1247.

Since 1977, therefore, Regulation B has recognized that a creditor engages in discrimination prohibited by the Additional Parties Rule and ECOA when it improperly requires an individual to guarantee or cosign her spouse's debt obligations—both when the primary borrower is the spouse and when the primary borrower is instead a business owned or operated by the spouse.

3. Although the Board has consistently defined *what* constitutes discrimination in violation of the Additional Parties Rule, it has not always clearly specified precisely *who* is discriminated against when the Rule is violated. Since 1985, however, Regulation B has made clear that when a creditor requires a spousal guarantee in violation of the Rule, both the primary borrower and the guarantor spouse qualify as "applicants" who suffer discrimination under the Act.

a. As originally promulgated in October 1975, Regulation B repeated ECOA's statutory definition of "applicant" without explicitly addressing the status of guarantors or other secondary obligors. 40 Fed. Reg. at 49,306. A few months later, however, the Board

added a substantive provision indicating that the term included "an applicant who is secondarily liable such as an endorser, co-maker * * * or guarantor." 41 Fed. Reg. 20,576-20,577 (May 19, 1976).

b. In 1977, the Board revised Regulation B in response to the 1976 amendments to ECOA. 42 Fed. Reg. at 1242. The revised regulation included a new definition of "applicant" specifically excluding "a guarantor, surety, endorser, or similar party." *Id.* at 1252. That exclusion ensured that, in dealing with guarantors, creditors would not be required to adhere to certain "technical rules" added to Regulation B to implement the 1976 amendments. Dolores S. Smith, *Revision of the Board's Equal Credit Regulation: An Overview*, 71 Fed. Res. Bull. 913, 918 (1985) (Smith). But the Board emphasized that "[r]equiring the signature of a guarantor or endorser on a discriminatory basis would be prohibited" under the Additional Parties Rule. 41 Fed. Reg. 49,124 (Nov. 8, 1976).

Because ECOA prohibits discrimination against "applicant[s]," 15 U.S.C. 1691(a), courts interpreted the 1977 amendments to Regulation B to mean that when a creditor violated the Additional Parties Rule by requiring a spousal guarantee, the only "applicant" who suffered discrimination under the Act was the primary borrower—not the guarantor spouse. See, *e.g.*, *Morse* v. *Mutual Fed. Sav. & Loan Ass'n of Whitman*, 536 F. Supp. 1271, 1278 (D. Mass. 1982). And because only "aggrieved applicant[s]" may bring suit under the Act, 15 U.S.C. 1691e(a)-(c), those courts also held that only the primary borrower could bring an action in court. See, *e.g.*, *Morse*, 536 F. Supp. at 1278; see also Smith 918.

c. In 1985, the Board revisited Regulation B's definition of "applicant." 50 Fed. Reg. 10,891 (Mar. 18, 1985). The Board explained that the prior definition had left "a guarantor whose signature has been illegally required" without recourse under ECOA. *Ibid.* The Board therefore proposed to define "applicant" to include guarantors and similar parties in order to clarify that when such parties are required to sign a credit instrument in violation of the Additional Parties Rule, they qualify as "applicants" who suffer discrimination in violation of the Act and who can therefore seek relief in court. *Ibid.*

The Board sought comment on whether to exclude guarantors from coverage under other provisions of Regulation B addressing "applicants." 50 Fed. Reg. at 10,891 Commenters responded that treating guarantors as "applicants" under certain other provisions could subject creditors to unwarranted liability for "technical violations." 50 Fed. Reg. 48,020 (Nov. 20, 1985). The Board therefore defined "applicant" to include "guarantors, sureties, endorsers and similar parties" only "[f]or purposes of" the Additional Parties Rule, 12 C.F.R. 202.7(d). 50 Fed. Reg. at 48,027.

The Board emphasized that this amended definition "impose[d] no new requirements on creditors." 50 Fed. Reg. at 48,018. The conduct prohibited by the Additional Parties Rule remained unchanged: As before, a creditor could not require a borrower's spouse to guarantee a loan solely because of marital status, and could not impose signature requirements on a guarantor that could not be imposed on a primary borrower. *Ibid.*; see 12 C.F.R. 202.7(d)(5) (1984). But the amendment clarified that violations of those rules

constitute discrimination not only against the primary borrower, but also against the guarantor spouse.

d. Since 1985, Regulation B has continued to define guarantors and other similar parties as "applicants" for purposes of the Additional Parties Rule. 12 C.F.R. 202.2(e) (2010); see 12 C.F.R. 1002.2(e) (current CFPB regulation).

C. The Present Controversy

1. Petitioners' husbands are the member-owners of PHC Development, LLC (PHC), a Missouri limited liability company. Between 2005 and 2008, PHC obtained four loans from respondent to finance a real estate development. Petitioners and their husbands executed personal guarantees on the loans. In 2012, respondent declared that PHC was in default on the loans and demanded payment under the guarantees. Pet. App. 2.

Petitioners filed a suit in the United States District Court for the Western District of Missouri alleging that respondent had violated ECOA and the Additional Parties Rule by requiring them to execute guarantees solely because they were married to PHC's owners. Petitioners sought damages and a declaration that the guarantees were void. Respondent counterclaimed, seeking enforcement of the guarantees. Petitioners asserted the alleged ECOA violation as an affirmative defense to the counterclaim. Pet. App. 3.

2. The district court dismissed petitioners' ECOA claim and struck their ECOA-based affirmative defense. Pet. App. 17-24. The court held that petitioners were not "applicants" under the Act because "a guarantor does not, by definition, apply for anything." *Id.* at 22 (citation omitted). The court declined to

defer to Regulation B because it believed that the Act was unambiguous. *Id.* at 22-23.

3. The court of appeals affirmed. Pet. App. 1-16.

a. The court of appeals held that ECOA "clearly provides that a person does not qualify as an applicant under the statute solely by virtue of executing a guaranty to secure the debt of another." Pet. App. 6. The court reasoned that because the Act defines an "applicant" as a person who "applies" for credit, 15 U.S.C. 1691a(b), "a person is an applicant only if she requests credit." Pet. App. 6. The court recognized that a guarantor "desires for a lender to extend credit to a borrower." *Id.* at 6-7. It also acknowledged that the Sixth Circuit had deferred to Regulation B's interpretation after concluding that the term "applicant" is ambiguous. *Id.* at 7 (citing *RL BB Acquisition, LLC* v. *Bridgemill Commons Dev. Grp.*, 754 F.3d 380, 385 (6th Cir. 2014)). But the court concluded that "it does not follow from the execution of a guaranty that a guarantor has requested credit or otherwise been involved in applying for credit." *Ibid.* And the court further concluded that because petitioners had not "alleged that they participated in the loan-application process" other than by executing guarantees, their claims were properly dismissed. *Id.* at 10.

b. Judge Colloton concurred. Pet. App. 11-16. He concluded that "an 'applicant' who 'applies for credit' is one who requests credit to benefit herself, not credit to benefit a third party." *Id.* at 12. He also argued that other provisions of ECOA referring to "applicants" confirm that the term includes only persons who seek credit for their own use. *Id.* at 12-14.

SUMMARY OF ARGUMENT

Since 1985, Regulation B has authoritatively construed ECOA to include guarantors within the class of "applicants" protected from discrimination under the Additional Parties Rule. That longstanding interpretation reflects a permissible construction of the Act and warrants deference under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842-843 (1984) (*Chevron*).

A. Regulation B's interpretation of "applicant" is entitled to great deference. Congress framed ECOA in general terms and granted the Board unusually broad authority to make regulations addressing the wide variety of credit transactions that fall within its scope. In construing the parallel delegation of authority in the Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.*, this Court has emphasized that Congress "specifically designated the [Board] * * * as the primary source for interpretation and application of [the] law." *Household Credit Servs., Inc.* v. *Pfennig*, 541 U.S. 232, 238 (2004) (citation omitted; first set of brackets in original). And deference is especially appropriate here because Congress has repeatedly amended the Act without disturbing the Board's longstanding interpretation of "applicant."

B. Regulation B's definition of "applicant" is a permissible interpretation of ECOA's text.

1. The Act defines an "applicant" as a person who "applies" for credit. 15 U.S.C. 1691a(b). In ordinary usage, to "apply" for something is to make a request for it. Guarantors are thus reasonably regarded as "applicants" because they request the extension of credit to the primary borrower—in fact, the whole purpose of a guarantee is to induce the creditor to make the loan. In practice, moreover, guarantors and

other secondary obligors are often extensively involved in the application process. The court of appeals thus erred in holding that ECOA's definition of "applicant" unambiguously excludes guarantors.

2. The court of appeals left open the possibility that a particular guarantor might qualify as an "applicant" if she were sufficiently involved in the application process. But the Board reasonably rejected a fact-intensive, case-by-case inquiry in favor of a rule that treats all guarantors and similar parties as "applicants" for purposes of the Additional Parties Rule. That approach provides clarity for creditors and consumers, which is especially important in light of the number and variety of transactions covered by ECOA.

3. Judge Colloton concluded that the term "applicant" includes only persons who request credit *for themselves*. But "applicant" does not carry that restrictive meaning. And even if it did, the Act still would not unambiguously exclude guarantors because—as other banking regulations confirm—a guarantor may reasonably be regarded as receiving an extension of credit.

C. Regulation B's definition of "applicant" furthers ECOA's purposes. When a creditor requires an individual to guarantee her spouse's loan solely because of the couple's marital status, the creditor discriminates against *both* the primary borrower *and* the guarantor spouse. The spouse is required to assume an unwanted liability and loses the ability to maintain an independent credit history. That is precisely the sort of discriminatory harm that ECOA sought to end. The same is true when a creditor improperly requires the owner of a small business borrower to provide not

only a personal guarantee, but also a guarantee from her spouse.

Because the practices prohibited by the Additional Parties Rule constitute discrimination against primary borrowers, they would be prohibited even if guarantors were not regarded as "applicants." But violations of the Rule discriminate against the affected guarantors as well, and Regulation B reasonably recognizes that those guarantors are entitled to protection under the Rule and ECOA. Treating guarantors and other secondary obligors as "applicants" also avoids arbitrary distinctions between individuals who are improperly required to join their spouses' credit obligations, but who do so in different capacities.

D. The other challenges to Regulation B's definition of "applicant" lack merit. First, treating guarantors as "applicants" would not create any anomaly or inconsistency in other provisions of ECOA. Second, Regulation B's definition is entitled to deference even though it has the effect of allowing additional individuals to sue under the Act's private right of action. *Chevron* applies with full force where, as here, an agency's interpretation of a substantive statutory provision affects the scope of an associated private right of action. Third, there is no merit to the Seventh Circuit's suggestion that treating guarantors as applicants unduly expands creditors' liability by allowing guarantors to void improperly obtained guarantees. See *Moran Foods, Inc.* v. *Mid-Atlantic Mkt. Dev. Co.*, 476 F.3d 436, 441, cert. denied, 552 U.S. 821 (2007). That remedial question raises distinct issues and will not be decided by this Court's resolution of the question presented.

ARGUMENT

REGULATION B PERMISSIBLY INTERPRETS ECOA TO PROTECT GUARANTORS FROM DISCRIMINATION

For 30 years, Regulation B has provided that, for purposes of the Additional Parties Rule, the "applicants" protected from discrimination by ECOA include guarantors, sureties, and similar parties such as cosigners. That interpretation was adopted through notice-and-comment rulemaking and pursuant to ECOA's unusually broad delegation of regulatory authority. Because it is a permissible construction of the Act, it is controlling under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842-843 (1984).

A. Regulation B Is Entitled To Deference

Where, as here, Congress provides "'an express delegation of authority to [an] agency to elucidate a specific provision of [a] statute by regulation,'" the agency's implementing regulations are "binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001) (quoting *Chevron*, 467 U.S. at 843-844). That principle has special force in this case.

1. ECOA broadly provides that "[i]t shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction." 15 U.S.C. 1691(a). Recognizing the complexity and variety of credit transactions, Congress did not attempt to enact a comprehensive list of the practices that constitute impermissible discrimination. Instead, adhering to the approach it had used in TILA, "Congress determined to lay the structure of the Act broadly and to entrust its construction to an agency

with the necessary experience and resources to monitor its operation." *Mourning* v. *Family Publ'ns Serv., Inc.*, 411 U.S. 356, 365 (1973).

As it did in TILA, Congress in ECOA granted the Board broad authority to "prescribe regulations to carry out the purposes of [the Act]." 15 U.S.C. 1691b(a); cf. 15 U.S.C. 1604 (1970). Using language drawn from TILA, Congress further provided:

> These regulations may contain but are not limited to such classifications, differentiation, or other provision, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the [Board] are necessary or proper to effectuate the purposes of [ECOA], to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith.

15 U.S.C. 1691b(a); cf. 15 U.S.C. 1604 (1970). Congress also provided that statutory references to the Act's requirements include requirements adopted in the Board's regulations. 15 U.S.C. 1691a(g).

This Court has emphasized that the parallel provisions of TILA delegate "expansive authority to the [Board] to enact appropriate regulations to advance th[e] purpose" of the statute, *Household Credit Servs., Inc.* v. *Pfennig*, 541 U.S. 232, 235 (2004), and indicate that Congress "specifically designated the [Board] * * * as the primary source for interpretation and application of [the] law," *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980). The Court has therefore admonished that, in interpreting TILA, "judges ought to refrain from substituting their own interstitial lawmaking for that of the [Board]." *Id.* at 568.

Like TILA, ECOA granted expansive rulemaking authority to an expert agency charged with implementing broad statutory requirements across a wide range of credit transactions. Accordingly, like rules promulgated under TILA, "the Board's regulation implementing this legislation should be accepted by the courts" absent "some obvious repugnance to the statute." *Anderson Bros. Ford* v. *Valencia*, 452 U.S. 205, 219 (1981); see *Pfennig*, 541 U.S. at 238-239.

2. Deference is especially appropriate in this case. Regulation B has defined "applicant" to include guarantors and other secondary obligors for three decades. This Court "will normally accord particular deference" where, as here, the agency interpretation in question is "of 'longstanding' duration." *Barnhart* v. *Walton*, 535 U.S. 212, 220 (2002) (citation omitted).

Moreover, Congress has repeatedly amended ECOA since 1985 without disapproving the Board's settled view.[4] "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986) (citation omitted); see, *e.g.*, *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 827-828 (2013). Congress's failure to disturb the Board's interpretation is especially notewor-

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[4] See, *e.g.*, Dodd-Frank Act, §§ 1071, 1474, 124 Stat. 2056-2057, 2199-2200; Act of Sept. 30, 1996, Pub. L. No. 104-208, § 2302, 110 Stat. 3009-420; Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 223, 105 Stat. 2306-2307; Women's Business Ownership Act of 1988 (Women's Business Act), Pub. L. No. 100-533, § 301, 102 Stat. 2692-2693.

thy because guarantors and other similar parties have routinely litigated violations of the Additional Parties Rule, and until recently Regulation B's interpretation of "applicant" had enjoyed "universal deference" from the courts. *RL BB Acquisition, LLC* v. *Bridgemill Commons Dev. Grp.*, 754 F.3d 380, 386 (6th Cir. 2014).[5]

B. Regulation B's Definition Of "Applicant" Is A Permissible Interpretation Of ECOA's Text

Because Regulation B's longstanding definition of "applicant" warrants deference, it is controlling unless "Congress has directly spoken to the precise question at issue" by unambiguously excluding guarantors from protection under ECOA. *Pfennig*, 541 U.S. at 239 (quoting *Chevron*, 467 U.S. at 842). Congress has not done so. To the contrary, the Act's definition of "applicant" readily encompasses guarantors and other secondary obligors.

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[5] See, *e.g.*, *Silverman* v. *Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 30-31 (3d Cir. 1995); *FDIC* v. *Medmark, Inc.*, 897 F. Supp. 511, 514-515 (D. Kan. 1995); *Integra Bank/Pittsburgh* v. *Freeman*, 839 F. Supp. 326, 328-330 (E.D. Pa. 1993); *Stern* v. *Espirito Santo Bank*, 791 F. Supp. 865, 867-869 (S.D. Fla. 1992); *Bank of the W.* v. *Kline*, 782 N.W.2d 453, 457-458 (Iowa 2010); *Boone Nat'l Sav. & Loan Ass'n* v. *Crouch*, 47 S.W.3d 371, 375-376 (Mo. 2001) (en banc); *Eure* v. *Jefferson Nat'l Bank*, 448 S.E.2d 417, 419-421 (Va. 1994). As respondent notes (Br. in Opp. 31-32), creditors in many cases did not challenge Regulation B's definition of "applicant." But the numerous cases litigated by guarantors and similar parties undermine respondent's speculation (Br. in Opp. 32-33) that the Board's longstanding interpretation went unnoticed when Congress revisited the Act.

1. Guarantors are reasonably viewed as "applicants" who request the extension of credit

a. ECOA defines an "applicant" as "any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit." 15 U.S.C. 1691a(b). Ordinarily, to "apply" for something means "to make a (formal) request." *Oxford English Dictionary*, http://www.oed.com/view/Entry/9724 (last visited May 26, 2015).[6] Thus, as the court of appeals recognized, a person qualifies as an "applicant" under the Act if she requests the extension of credit. Pet. App. 6.

That understanding of "applicant" encompasses guarantors and other secondary obligors. A guarantor "formally approach[es] a creditor in the sense that the guarantor offers up her own personal liability," and the whole purpose of that offer is to induce the creditor to make the loan. *RL BB Acquisition*, 754 F.3d at 385. Accordingly, it has long been understood that a guarantor (at a minimum) "impliedly request[s]" the extension of credit to the primary borrower. 38A C.J.S. *Guaranty* § 26 (2008); see 1 Joseph M. Perillo, *Corbin on Contracts* § 3.14, at 381 (rev. ed.

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[6] See *The American Heritage Dictionary of the English Language* 87 (4th ed. 2006) ("[t]o request or seek assistance, employment, or admission"); *Black's Law Dictionary* 120 (10th ed. 2014) ("[t]o make a formal request or motion"); *The Random House Dictionary of the English Language* 102 (2d ed. 1987) ("to make an application or request"); *Webster's Third New International Dictionary of the English Language* 105 (1971) ("to make an appeal or a request, esp. formally and often in writing and usu. for something of benefit to oneself").

1993) (*Corbin*) ("In most cases of guaranty contracts, the offer comes from the guarantor requesting the giving of credit to a principal debtor."); see also, *e.g.*, *Paul Revere Protective Life Ins. Co.* v. *Weis*, 535 F. Supp. 379, 386 (E.D. Pa. 1981) ("implied[] request[]"); *Valley Nat'l Bank* v. *Foreign Car Rental, Inc.*, 404 P.2d 272, 274 (Colo. 1965) ("request for credit"); *Union Bank* v. *Coster's Ex'rs*, 3 N.Y. 203, 211 (1850) ("implies a request").

Indeed, a guarantee is typically enforceable precisely because the guarantor has expressly or impliedly requested that the creditor extend credit. Like other contracts, guarantee agreements generally must be supported by consideration—something "sought by the [guarantor] in exchange for his promise." Restatement (Second) of Contracts § 71(2) (1981); see Restatement of Guaranty § 9. In the usual case, that bargained-for consideration is the loan made to the primary borrower. Restatement of Guaranty § 9, cmt. a; 3 *Corbin* § 9.4, at 252-253 (rev. ed. 1996). A guarantee is thus reasonably understood as a request that the creditor extend credit. *RL BB Acquisition*, 754 F.3d at 385.[7]

b. The actions commonly taken by guarantors and other secondary obligors confirm the reasonableness of that understanding.

Some guarantee agreements expressly "request" an extension of credit. See, *e.g.*, *Equitable Trust Co.*

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[7] Guarantors also apply for credit "directly" within the meaning of 15 U.S.C. 1691a(b). The Act refers to "direct[]" applications to distinguish them from "indirect[]" applications in which a consumer attempts to use an "existing credit plan" such as a credit card to make a purchase "for an amount exceeding a previously established credit limit." *Ibid.*; see Senate Report 10.

v. *Bratwursthaus Mgmt. Corp.*, 514 F.2d 565, 569 (4th Cir. 1975) (reciting that the guarantor "requested [the creditor]" to make the loans); *Cardinal Wholesale Supply, Inc.* v. *Chaisson*, 504 So. 2d 167, 168 (La. Ct. App. 1987) (similar). Indeed, some of the guarantees at issue here state that they were executed "to induce [respondent] to extend * * * credit" to PHC. D. Ct. Doc. 4-1, at 24, 27 (July 13, 2012).

In addition, secondary obligors are often extensively involved in the application process. Cosigners of consumer loans frequently join in the primary borrowers' requests for credit by signing the same applications. See 12 C.F.R. Pt. 202, App. B (2010) (model consumer credit applications). Personal guarantees required for business loans are likewise often "contained within the promissory agreement" or credit application signed by the principal borrower. *United States* v. *Crain Ltd. P'ship*, 884 F.2d 138, 143 n.5 (4th Cir. 1989).[8] And prospective secondary obligors are commonly required to provide financial information and subjected to a creditworthiness analysis comparable to that applied to principal borrowers. See 12 C.F.R. Pt. 202, App. B (2010) (model consumer credit applications); 76 Fed. Reg. 41,597 (July 15, 2011).

c. The court of appeals was thus quite wrong to assert that "a guarantor unambiguously does not request credit." Pet. App. 7. Guarantors always request credit implicitly, often do so explicitly, and regularly participate extensively in the application process—

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[8] See also, *e.g.*, *Capitol Grp., Inc.* v. *Collier*, 365 S.W.3d 644, 650 (Mo. Ct. App. 2012); *American Builders & Contractors Supply Co.* v. *Frank's Roofing, Inc.*, 979 N.E.2d 15, 17 (Ohio Ct. App. 2012); *Jamshed* v. *McLane Express Inc.*, 449 S.W.3d 871, 879 (Tex. Ct. App. 2014).

sometimes by signing the application submitted by the primary borrower. Particularly in light of ECOA's broadly framed prohibition making it unlawful for "*any* creditor to discriminate against *any* applicant, with respect to *any* aspect of a credit transaction" and defining "applicant" to include "*any* person who applies" for credit, 15 U.S.C. 1691(a), 1691a(b) (emphases added), Regulation B permissibly interprets the Act to extend protection to guarantors, cosigners, and other secondary obligors. Cf. *United States* v. *Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 7 (2008) ("Five 'any's' in one sentence and it begins to seem that Congress meant the statute to have expansive reach.").

2. Regulation B permissibly adopted a bright-line rule treating all secondary obligors as "applicants" for purposes of the Additional Parties Rule

The court of appeals did not address ECOA's coverage of secondary obligors other than guarantors. It also appeared to leave open the possibility that, in a particular case, a guarantor might qualify as an "applicant" under ECOA if she "participated in the loan-application process" to some unspecified extent. Pet. App. 10; see *id.* at 6 ("a person does not qualify as an applicant under the statute *solely* by virtue of executing a guaranty") (emphasis added). But the Board reasonably declined to make the Act's coverage turn on an ill-defined, fact-intensive inquiry into the circumstances of a particular guarantor's involvement in a specific application.

Instead, Regulation B establishes a bright-line rule encompassing all "guarantors, sureties, endorsers, and similar parties." 12 C.F.R. 202.2(e) (2010). That approach is consistent with ECOA's definition of "applicant" because all secondary obligors at least implic-

itly request that the creditor extend credit to the primary borrower. And Regulation B's "clear, easy to apply (and easy to enforce) rule," *Pfennig*, 541 U.S. at 245, was a reasonable exercise of the Board's authority to "prescribe regulations to carry out the purposes of [ECOA]" and to make "such classifications, differentiation, or other provision" as the Board deemed "necessary or proper to effectuate the purposes" of the Act, 15 U.S.C. 1691b(a). Particularly because the Act applies to a wide variety of credit transactions entered into under diverse circumstances, the "case-by-case approach" contemplated by the court of appeals would lead to uncertainty for creditors and consumers and litigation about the application of the Act to the circumstances of particular transactions. *Pfennig*, 541 U.S. at 244.

3. A person need not request credit for her own use in order to qualify as an "applicant"

In his separate concurrence, Judge Colloton appeared to acknowledge that a guarantor or other secondary obligor "requests credit." Pet. App. 12. But he asserted that "an 'applicant' who 'applies for credit' is one who requests credit to benefit herself, not credit to benefit a third party." *Ibid.* Judge Colloton relied on a dictionary defining "apply" as "to make an appeal or request *usu[ally] for something of benefit to oneself*." *Id.* at 11-12 (quoting *Webster's Third New International Dictionary of the English Language* 105 (1971) (*Webster's Third*)). He acknowledged that "there are unusual meanings of 'apply' that encompass making a request on behalf of another," but he maintained that the existence of such meanings "is not sufficient to make a term ambiguous for pur-

poses of *Chevron*." *Id.* at 12. That analysis suffers from three fatal flaws.

First, the ordinary meaning of "apply" does not exclude requests for benefits to others. Most standard definitions of the term omit that limitation. See p. 18 & note 6, *supra*. Even the dictionary cited in the concurrence specifies only that the term "usu[ally]" refers to a request for something that benefits the requester—not that the relevant meaning excludes requests that benefit someone else. *Webster's Third* 105. And even if it supported a more restrictive interpretation, a single dictionary could not demonstrate that the Act *unambiguously* excludes a broader meaning. To the contrary, "[t]he existence of alternative dictionary definitions * * * , each making some sense under the statute, itself indicates that the statute is open to interpretation." *National R.R. Passenger Corp.* v. *Boston & Me. Corp.*, 503 U.S. 407, 418 (1992).

Second, Regulation B would be a permissible interpretation of "applicant" even if the term encompassed only an individual who requests something to benefit herself. As the court of appeals recognized, guarantors typically offer a guarantee precisely because they "desire[] for a lender to extend credit to a borrower." Pet. App. 6-7. The guarantees in this case, for example, stated that petitioners "expect[ed] to derive substantial benefits" from the loans. D. Ct. Doc. 4-1, at 24, 27. The concurrence thus must limit the term "apply" further: It is not enough that an individual requests an extension of credit that will benefit her; she must also *receive* the credit herself. But the concurrence cited no authority supporting that further

limitation on the ordinary meaning of the word "apply."

Third, even if the term "applicant" included only parties that would receive the requested extension of credit, it still would not unambiguously exclude guarantors and other secondary obligors. Other banking statutes and regulations addressing persons who receive an "extension of credit" (or using comparable terms such as "borrower") are reasonably construed to include guarantors. See, *e.g.*, 12 C.F.R. 215.3(a)(4), 618.8325, 932.9(a). For example, banking regulators consider a guarantor to receive an "extension of credit" for purposes of a provision of the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, that allows consumer reporting agencies to furnish a consumer's credit report in connection with a transaction "involving the *extension of credit* to * * * the consumer." 15 U.S.C. 1681b(a)(3)(A) (emphasis added).[9]

C. Regulation B's Definition Of "Applicant" Furthers ECOA's Purposes

Regulation B's definition of "applicant" advances one of the central purposes of ECOA: the elimination of marital-status discrimination in credit transactions. Violations of the Additional Parties Rule affecting

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[9] See Letter from the Office of the Comptroller of the Currency et al. to the Fed. Trade Comm'n (May 31, 2001), https://www.fdic.gov/news/news/financial/2001/fil0161a.html; see also Fed. Trade Comm'n, *Advisory Opinion to Tatelbaum* (June 22, 2001), https://www.ftc.gov/policy/advisory-opinions/advisory-opinion-tatelbaum-06-22-01. These examples refute the assumption that a guarantor *cannot* be viewed as receiving an extension of credit. But the term is ambiguous, and in other contexts agencies have reasonably determined that a guarantor should not be viewed as receiving an "extension of credit." See, *e.g.*, 12 C.F.R. Pt. 31, App. B.

guarantors and other secondary obligors take two basic forms, both of which constitute the type of discrimination that ECOA sought to end. Excluding guarantors from the definition of "applicant" would not affect the scope of the conduct prohibited by the Rule—a creditor improperly insisting on a spousal guarantee would still violate the rights of the primary borrower. But accepting the court of appeals' approach would undermine the Act by failing to accord relief to an entire class of victims harmed by the violations, and it would create arbitrary distinctions between parties that are equivalently situated for all purposes relevant under the Act.

1. The most straightforward violations of the Additional Parties Rule occur when a creditor requires a borrower's spouse to cosign or guarantee a loan even though the creditor would have extended credit without another signature if the borrower had been unmarried. See 12 C.F.R. 202.7(d)(1) (2010). Prior to ECOA, such requirements were routine. Senate Report 17-18; Geary 1652.

One of the principal purposes of the Act was to eliminate spousal-signature requirements in order to ensure that creditworthy married persons can obtain independent credit and establish their own credit profiles. Senate Report 16-17. Congress was concerned, for example, that widows and divorcees faced difficulty getting credit because their credit histories were typically in their husbands' names. *Id.* at 16. The forced linkage of spouses' credit histories also meant that women "share[d] the taint of any adverse information" in their husbands' credit reports, which "impair[ed] [their] effort to secure independent credit." *Credit Discrimination: Hearings Before the*

Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency, 93d Cong., 2d Sess. 273 (1974) (report by United States Comm'n on Civil Rights).

When a creditor requires a borrower's spouse to cosign or guarantee a loan solely because of the couple's marital status, the creditor obviously discriminates against *the borrower*, who is denied the ability to obtain individual credit and is subjected to a requirement that would not have been imposed on an unmarried person. But such requirements also constitute marital-status discrimination against *the guarantor*, who is "required to assume a debt obligation merely by virtue of being married to the applicant." Smith 918-919.

A spouse who is required to cosign or guarantee a loan also suffers one of the core discriminatory harms that ECOA sought to prevent: the inability to maintain an independent credit profile. As the major credit-reporting agencies explain, cosigning or guaranteeing a loan "could negatively impact [the spouse's] credit report and creditworthiness."[10] From the outset, the obligation may "appear on [the spouse's] credit report" and "impact [her] credit scores."[11] And if

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[10] Mechel Glass, Equifax, *Should I Co-Sign On a Loan for a Family Member?* (Apr. 17, 2014), http://blog.equifax.com/credit/should-i-co-sign-on-a-loan-for-a-family-member.

[11] Experian, *Credit Score FAQs*, http://www.experian.com/credit-education/score-faqs.html (last visited May 26, 2015). Immediate reporting to credit bureaus is most common when individuals cosign consumer debt, but recently some creditors have begun reporting guarantees of business loans as well. See, *e.g.*, John Tozzi, *When Your Business Loan Affects Your Personal Credit*, Bloomberg Bus. (Jan. 25, 2010), http://www.businessweek.com/smallbiz/content/jun2009/sb20090612_665812.htm.

the borrower "miss[es] payments or default[s] on the loan, [the spouse's] credit reports will show the delinquencies," thereby tarnishing her credit history and ability to secure credit—even if she pays the debt.[12]

As noted, the Additional Parties Rule would prohibit spousal-signature requirements even if guarantors were not "applicants" under ECOA—and in fact did so before the Board amended Regulation B's definition to include guarantors. See 12 C.F.R. 202.7(d) (1984). The Rule effectuates the Act's prohibition on marital-status discrimination against primary borrowers whether or not guarantors also qualify as "applicants." But excluding guarantors from the definition of "applicant" ignores the fact that a spouse who is improperly required to guarantee a loan also suffers the sort of discrimination that ECOA sought to prevent. And where, as is often the case, the spouse accedes to the demand for an illegal guarantee, it also leaves the victim most likely to suffer injury from the violation without a remedy under the Act.

2. The other paradigmatic violation of the Additional Parties Rule occurs in connection with business credit. As explained above, creditors routinely (and prudently) require personal guarantees from the owners of small businesses. See pp. 5-6, *supra*. But where a creditor also requires personal guarantees from the owners' spouses—and where, as petitioners allege occurred here, it does so solely because of their marital status—that further request violates the Rule.

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[12] TransUnion, *The Benefits and Issues of Co-Signing a Loan*, http://www.transunion.com/personal-credit/credit-issues-bad-credit/cosigning-a-loan.page (last visited May 26, 2015); see 12 C.F.R. 227.14(b)(1).

12 C.F.R. 202.7(d) (2010); 12 C.F.R. Pt. 202, Supp. I, ¶ 7(d)(6)-2 (2010).

Violation of the Rule in this manner inflicts similar discriminatory injuries on the spouse who is required to sign a guarantee because of her marital status. It also implicates another of ECOA's central purposes by discriminating against the married business owner who is denied the ability to guarantee her business's loan without her spouse's involvement. Congress sought to ensure that creditworthy individuals "have equal access to the benefits of full participation in the credit economy," without regard to sex or marital status. Senate Report 18. One important aspect of the credit economy is the ability of entrepreneurs and small business owners to secure commercial credit, and in amending ECOA Congress has repeatedly sought to ensure that businesses owned by women have full and equal access to loans.[13] When a small business owner or officer who is individually creditworthy is denied the ability to guarantee a business loan by herself and is instead required to secure a spousal guarantee, that owner suffers the type of discrimination that ECOA was intended to prevent.

Again, this sort of demand for a spousal guarantee would violate the Additional Parties Rule even if guarantors did not qualify as "applicants"—and was prohibited even before the 1985 amendment to the regulation. See 12 C.F.R. 202.7(d)(5) (1984).[14] But

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[13] See H.R. Rep. No. 955, 100th Cong., 2d Sess. 15 (1988); see also Dodd-Frank Act, § 1071, 124 Stat. 2056-2057; Women's Business Act, § 301, 102 Stat. 2692-2693.

[14] Although the only "applicant" in that circumstance would be the business entity, requiring the spousal guarantee would violate the business's rights under ECOA by discriminating against it on

treating guarantors as "applicants" in this circumstance properly recognizes that the signature requirement constitutes discrimination not only against the business entity that sought the loan, but also against the owner or officer who was denied the ability to secure credit for her business by providing an individual guarantee.

3. Finally, excluding guarantors and other secondary obligors from protection under ECOA would lead to arbitrary distinctions. Before the Act, when creditors routinely demanded that married borrowers obtain signatures from their spouses, the capacity in which spouses were required to sign "varie[d] from case to case." Geary 1652. Some creditors insisted on a guarantee or co-signature, while others required a spouse's signature as a joint borrower rather than as a secondary obligor. See Senate Report 17; see also, *e.g.*, *Anderson* v. *United Fin. Co.*, 666 F.2d 1274, 1276-1277 (9th Cir. 1982).

The two alternatives are equivalent from the creditor's standpoint: In either case, the creditor secures the right to pursue both spouses for the full amount of the loan. The alternatives also have the same discriminatory effects: In either case, the primary borrower is unable to obtain individual credit and her spouse is required to assume an unwanted liability because of

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the basis of its owner's marital status. See 12 C.F.R. Pt. 202, Supp. I, ¶ 2(z)-1 (2010) (explaining that the Act bars discrimination based on the characteristics of the "officers of an applicant in the case of a corporation" and discrimination based on "the characteristics of individuals with whom an applicant is affiliated or with whom the applicant associates"). Petitioners thus err in contending (Br. 11, 29-33) that a decision holding that only principal borrowers qualify as "applicants" would deny business entities protection under ECOA.

marital status. Under the court of appeals' interpretation, however, the two scenarios have very different consequences: A spouse who is required to become a joint borrower qualifies as an "applicant" entitled to protection and relief under ECOA, but a spouse who is required to become a guarantor does not—despite experiencing equivalent discrimination and suffering essentially the same harms. Those "illogical results * * * argue strongly against the conclusion that Congress intended" to exclude guarantors from protection under the Act. *Western Air Lines, Inc.* v. *Board of Equalization*, 480 U.S. 123, 133 (1987).

D. The Remaining Objections To Regulation B Lack Merit

Respondent and others have argued that Regulation B's definition of "applicant" is inconsistent with other provisions of ECOA, that it impermissibly expands the Act's private right of action, and that it unduly increases creditors' liability. Those contentions are unsound.

1. Regulation B's definition of "applicant" is consistent with other provisions of ECOA

Respondent and Judge Colloton's concurrence argued that other provisions of ECOA demonstrate that the term "applicant" includes only primary borrowers. None of the provisions on which they rely support, much less compel, that narrow interpretation.

First, the concurrence noted that ECOA requires a creditor to "notify *the* applicant of its action on the application." 15 U.S.C. 1691(d)(1) (emphasis added). The concurrence argued that the "use of the definite article" demonstrates that "the applicant is the single person to whom credit would be extended." Pet. App.

12. But that inference is foreclosed by the Dictionary Act's instruction that "words importing the singular include and apply to several persons, parties, or things." 1 U.S.C. 1. It also fails to account for the common situation in which two parties apply jointly for shared credit for which they will both have primary liability.[15]

Second, the concurrrence observed that the Act requires creditors to provide notice to "[e]ach applicant against whom adverse action is taken," but specifies that a refusal to extend additional credit under an existing arrangement is not an "adverse action" if "the applicant is delinquent or otherwise in default." 15 U.S.C. 1691(d)(2) and (6). The concurrence assumed that if guarantors were treated as "applicants" for purposes of this provision, a creditor would have to provide notice of an adverse action to a guarantor even if it refused to extend credit because the primary borrower was delinquent. Pet. App. 13. But that assumption is incorrect. A guarantor applies for the same extension of credit sought by the primary borrower. If the creditor refuses to extend the requested credit because the primary borrower is delinquent, there is no "adverse action" at all and no party is entitled to an adverse-action notice.[16]

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[15] Nor is it "unnatural" to say that a guarantor submits a "completed application for credit" or an "application for a loan" under 15 U.S.C. 1691(d)(1) and (e)(1). Pet. App. 13. A guarantor's agreement to accept personal liability, offered to induce a creditor to extend credit, may reasonably be considered part of the "application" submitted by the primary borrower.

[16] The concurrence also erred in stating that guarantors could not fit within Section 1691(d)'s provisions governing "applicants" because guarantors do not "become 'delinquent' or 'in default.'" Pet. App. 13. In fact, that is precisely the consequence when a

Third, the concurrence noted that Section 1691(d)(4) contemplates a circumstance in which a creditor may be "*requested by a third party* to make a specific extension of credit directly or indirectly to an applicant." The concurrence inferred that *any* person other than the primary borrower who requests credit must be a "third party" covered by this provision. Pet. App. 13-14. But as the context makes clear, the "third part[ies]" referenced in Section 1691(d)(4) are intermediaries who handle credit applications—for example, a car dealer who "shops" a buyer's application to multiple lenders. 42 Fed. Reg. at 1248. That provision thus sheds no light on the status of guarantors, who perform a very different role.

Finally, respondent relies (Br. in Opp. 33-34) on a provision requiring financial institutions to maintain certain information about applications for credit for "women-owned, minority-owned, or small business[es]." 15 U.S.C. 1691c-2(b). Respondent notes that the required information includes "the amount of the credit or credit limit applied for, and the amount of the credit transaction or the credit limit approved for such applicant," and asserts that this requirement could not encompass guarantors. 15 U.S.C. 1691c-2(e)(2)(C). That is incorrect. CFPB has not yet implemented Section 1691c-2, and Regulation B has thus far treated guarantors as "applicants" only for purposes of the Additional Parties Rule. 12 C.F.R. 1002.2(e). But nothing would prevent the Bureau

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guarantor fails to satisfy its obligations. See, *e.g.*, 12 C.F.R. Pt. 202, App. B (2010) (Uniform Residential Loan Application asking whether mortgage applicant is "*delinquent or in default* on any Federal debt or any other loan, mortgage, financial obligation, bond, *or loan guarantee*") (emphases added).

from requiring creditors to maintain records reflecting "the amount of the credit transaction or the credit limit approved" for a guarantor.

2. Regulation B's definition of "applicant" does not impermissibly expand ECOA's private right of action

Judge Colloton's concurrence also suggested that Regulation B's definition of "applicant" reflects an impermissible expansion of ECOA's private right of action. Pet. App. 15-16. It is true that when the Board amended Regulation B's definition of "applicant" to include guarantors, it stated that the change would "give guarantors legal standing in the courts" to seek redress for violations of the Additional Parties Rule. 50 Fed. Reg. at 48,018. But Regulation B's definition of "applicant" construes the scope of ECOA's substantive provision barring discrimination "against any applicant." 15 U.S.C. 1691(a). The change clarified that when a creditor violates the Additional Parties Rule by requiring a spousal guarantee, the primary borrower and the guarantor spouse both suffer discrimination in violation of the Act. Smith 918-919. The Board's reference to a "change in 'standing'" thus reflected its "enlarged view about what is unlawful about [a lender's] conduct" when the lender violates the Rule. *Mayes* v. *Chrysler Credit Corp.*, 37 F.3d 9, 11 (1st Cir. 1994).

The Board's expanded view of ECOA's substantive scope has the consequence that additional parties may assert claims under the Act's private right of action, 15 U.S.C. 1691e(a)-(c). But this Court has made clear that *Chevron* applies with full force where, as here, an agency's "reasonable interpretation of ambiguous language in a substantive statutory provision" affects

the scope of a private right of action that is "expressly linked" to the substantive provision. *Global Crossing Telecomms., Inc.* v. *Metrophones Telecomms., Inc.*, 550 U.S. 45, 59 (2007). "A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." *Alexander* v. *Sandoval*, 532 U.S. 275, 284 (2001).

3. Regulation B's definition of "applicant" does not unduly expand the scope of liability under ECOA

The Seventh Circuit has suggested, in dicta, that Regulation B's definition of "applicant" unduly expands creditors' liability. *Moran Foods, Inc.* v. *Mid-Atlantic Mkt. Dev. Co.*, 476 F.3d 436, 441, cert. denied, 552 U.S. 821 (2007). The Seventh Circuit believed that if a guarantor qualified as an "applicant," then an improperly obtained guarantee would be "unenforceable"—which would mean that a creditor that violated the Additional Parties Rule could "lose the entire debt" if the primary borrower defaulted. *Ibid.* But that objection conflates the validity of Regulation B's treatment of guarantors with a distinct set of remedial issues that are not presented here.

Some courts have held that a guarantor or other party may assert an ECOA violation as a defense to a creditor's attempt to enforce an improperly obtained guarantee. See, *e.g.*, *RL BB Acquisition*, 754 F.3d at 387; *Silverman* v. *Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 32-33 (3d Cir. 1995). But other courts have held, without questioning guarantors' status as "applicants," that ECOA does not permit that remedy. See, *e.g.*, *FDIC* v. *32 Edwardsville, Inc.*, 873 F. Supp. 1474, 1480 (D. Kan. 1995). Treating guarantors as "applicants" thus does not necessarily

lead to the conclusion that illegal guarantees are unenforceable.

Conversely, *excluding* guarantors from the definition of "applicant" would not necessarily prevent the invalidation of a guarantee obtained in violation of the Additional Parties Rule. The guarantor would not be an "aggrieved applicant" eligible to seek relief under the Act. 15 U.S.C. 1691e(a)-(c). But the primary borrower could bring an action seeking to void the guarantee, or the guarantor could attempt to raise the ECOA violation as a defense under state-law principles barring the enforcement of illegal contracts. See, *e.g.*, *Bank of the W.* v. *Kline*, 782 N.W.2d 453, 462-463 (Iowa 2010). Alternatively, a federal regulatory agency could require the lender to release the improperly obtained guarantee—as has been the banking agencies' longstanding enforcement policy. See Board, *Supervisory Enforcement Policy for the ECOA and the Fair Housing Act* 5-7 (Oct. 23, 1981) (on file with the Office of the Solicitor General).

None of those remedial questions will be decided by the Court's resolution of the question presented—and the Seventh Circuit thus went astray in suggesting that its view of the proper scope of liability under ECOA provided a basis for refusing to defer to Regulation B's permissible interpretation of "applicant."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 15 U.S.C. 1691 provides:

Scope of prohibition

(a) Activities constituting discrimination

It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—

(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);

(2) because all or part of the applicant's income derives from any public assistance program; or

(3) because the applicant has in good faith exercised any right under this chapter.

(b) Activities not constituting discrimination

It shall not constitute discrimination for purposes of this subchapter for a creditor—

(1) to make an inquiry of marital status if such inquiry is for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit and not to discriminate in a determination of credit-worthiness;

(2) to make an inquiry of the applicant's age or of whether the applicant's income derives from any public assistance program if such inquiry is for the purpose of determining the amount and probable continuance of income levels, credit history, or

other pertinent element of credit-worthiness as provided in regulations of the Bureau;

(3) to use any empirically derived credit system which considers age if such system is demonstrably and statistically sound in accordance with regulations of the Bureau, except that in the operation of such system the age of an elderly applicant may not be assigned a negative factor or value;

(4) to make an inquiry or to consider the age of an elderly applicant when the age of such applicant is to be used by the creditor in the extension of credit in favor of such applicant; or

(5) to make an inquiry under section 1691c-2 of this title, in accordance with the requirements of that section.

(c) Additional activities not constituting discrimination

It is not a violation of this section for a creditor to refuse to extend credit offered pursuant to—

(1) any credit assistance program expressly authorized by law for an economically disadvantaged class of persons;

(2) any credit assistance program administered by a nonprofit organization for its members or an economically disadvantaged class of persons; or

(3) any special purpose credit program offered by a profit-making organization to meet special so-

cial needs which meets standards prescribed in regulations by the Bureau;

if such refusal is required by or made pursuant to such program.

(d) Reason for adverse action; procedure applicable; "adverse action" defined

(1) Within thirty days (or such longer reasonable time as specified in regulations of the Bureau for any class of credit transaction) after receipt of a completed application for credit, a creditor shall notify the applicant of its action on the application.

(2) Each applicant against whom adverse action is taken shall be entitled to a statement of reasons for such action from the creditor. A creditor satisfies this obligation by—

(A) providing statements of reasons in writing as a matter of course to applicants against whom adverse action is taken; or

(B) giving written notification of adverse action which discloses (i) the applicant's right to a statement of reasons within thirty days after receipt by the creditor of a request made within sixty days after such notification, and (ii) the identity of the person or office from which such statement may be obtained. Such statement may be given orally if the written notification advises the applicant of his right to have the statement of reasons confirmed in writing on written request.

(3) A statement of reasons meets the requirements of this section only if it contains the specific reasons for the adverse action taken.

(4) Where a creditor has been requested by a third party to make a specific extension of credit directly or indirectly to an applicant, the notification and statement of reasons required by this subsection may be made directly by such creditor, or indirectly through the third party, provided in either case that the identity of the creditor is disclosed.

(5) The requirements of paragraph (2), (3), or (4) may be satisfied by verbal statements or notifications in the case of any creditor who did not act on more than one hundred and fifty applications during the calendar year preceding the calendar year in which the adverse action is taken, as determined under regulations of the Bureau.

(6) For purposes of this subsection, the term "adverse action" means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.

(e) Copies furnished to applicants

(1) In general

Each creditor shall furnish to an applicant a copy of any and all written appraisals and valuations developed in connection with the applicant's application for a loan that is secured or would have been secured by a first lien on a dwelling promptly upon completion, but in no case later than 3 days prior to the closing of the loan, whether the creditor grants or denies the applicant's request for credit or the application is incomplete or withdrawn.

(2) Waiver

The applicant may waive the 3 day requirement provided for in paragraph (1), except where otherwise required in law.

(3) Reimbursement

The applicant may be required to pay a reasonable fee to reimburse the creditor for the cost of the appraisal, except where otherwise required in law.

(4) Free copy

Notwithstanding paragraph (3), the creditor shall provide a copy of each written appraisal or valuation at no additional cost to the applicant.

(5) Notification to applicants

At the time of application, the creditor shall notify an applicant in writing of the right to receive a

copy of each written appraisal and valuation under this subsection.

(6) Valuation defined

For purposes of this subsection, the term "valuation" shall include any estimate of the value of a dwelling developed in connection with a creditor's decision to provide credit, including those values developed pursuant to a policy of a government sponsored enterprise or by an automated valuation model, a broker price opinion, or other methodology or mechanism.

2. 15 U.S.C. 1691a provides in pertinent part:

Definitions; rules of construction

* * * * *

(b) The term "applicant" means any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit.

* * * * *

(d) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.

* * * * *

(f) The term "person" means a natural person, a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.

(g) Any reference to any requirement imposed under this subchapter or any provision thereof includes reference to the regulations of the Bureau under this subchapter or the provision thereof in question.

3. 15 U.S.C. 1691b provides in pertinent part:

Promulgation of regulations by the Bureau

(a) In general

The Bureau shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain but are not limited to such classifications, differentiation, or other provision, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith.

(b) Exempt transactions

Such regulations may exempt from the provisions of this subchapter any class of transactions that are not primarily for personal, family, or household purposes, or business or commercial loans made available by a financial institution, except that a particular type within a class of such transactions may be exempted if the Bureau determines, after making an express finding

that the application of this subchapter or of any provision of this subchapter of such transaction would not contribute substantially to effecting the purposes of this subchapter.

(c) Limitation on exemptions

An exemption granted pursuant to subsection (b) shall be for no longer than five years and shall be extended only if the Bureau makes a subsequent determination, in the manner described by such paragraph,[1] that such exemption remains appropriate.

* * * * *

4. 15 U.S.C. 1691c-2 provides in pertinent part:

Small business loan data collection

(a) Purpose

The purpose of this section is to facilitate enforcement of fair lending laws and enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.

(b) Information gathering

Subject to the requirements of this section, in the case of any application to a financial institution for credit for women-owned, minority-owned, or small business, the financial institution shall—

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[1] So in original. Probably should be "subsection,"

(1) inquire whether the business is a women-owned, minority-owned, or small business, without regard to whether such application is received in person, by mail, by telephone, by electronic mail or other form of electronic transmission, or by any other means, and whether or not such application is in response to a solicitation by the financial institution; and

(2) maintain a record of the responses to such inquiry, separate from the application and accompanying information.

(c) Right to refuse

Any applicant for credit may refuse to provide any information requested pursuant to subsection (b) in connection with any application for credit.

(d) No access by underwriters

(1) Limitation

Where feasible, no loan underwriter or other officer or employee of a financial institution, or any affiliate of a financial institution, involved in making any determination concerning an application for credit shall have access to any information provided by the applicant pursuant to a request under subsection (b) in connection with such application.

(2) Limited access

If a financial institution determines that a loan underwriter or other officer or employee of a financial institution, or any affiliate of a financial institution, involved in making any determination concerning an application for credit should have access

to any information provided by the applicant pursuant to a request under subsection (b), the financial institution shall provide notice to the applicant of the access of the underwriter to such information, along with notice that the financial institution may not discriminate on the basis of such information.

(e) Form and manner of information

(1) In general

Each financial institution shall compile and maintain, in accordance with regulations of the Bureau, a record of the information provided by any loan applicant pursuant to a request under subsection (b).

(2) Itemization

Information compiled and maintained under paragraph (1) shall be itemized in order to clearly and conspicuously disclose—

(A) the number of the application and the date on which the application was received;

(B) the type and purpose of the loan or other credit being applied for;

(C) the amount of the credit or credit limit applied for, and the amount of the credit transaction or the credit limit approved for such applicant;

(D) the type of action taken with respect to such application, and the date of such action;

(E) the census tract in which is located the principal place of business of the women-owned, minority-owned, or small business loan applicant;

(F) the gross annual revenue of the business in the last fiscal year of the women-owned, minority-owned, or small business loan applicant preceding the date of the application;

(G) the race, sex, and ethnicity of the principal owners of the business; and

(H) any additional data that the Bureau determines would aid in fulfilling the purposes of this section.

(3) No personally identifiable information

In compiling and maintaining any record of information under this section, a financial institution may not include in such record the name, specific address (other than the census tract required under paragraph (1)(E)),[1] telephone number, electronic mail address, or any other personally identifiable information concerning any individual who is, or is connected with, the women-owned, minority-owned, or small business loan applicant.

(4) Discretion to delete or modify publicly available data

The Bureau may, at its discretion, delete or modify data collected under this section which is or will

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[1] So in original. Probably should be "(2)(E)),".

be available to the public, if the Bureau determines that the deletion or modification of the data would advance a privacy interest.

* * * * *

5. 15 U.S.C. 1691e provides in pertinent part:

Civil liability

(a) Individual or class action for actual damages

Any creditor who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class.

(b) Recovery of punitive damages in individual and class action for actual damages; exemptions; maximum amount of punitive damages in individual actions; limitation on total recovery in class actions; factors determining amount of award

Any creditor, other than a government or governmental subdivision or agency, who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for punitive damages in an amount not greater than $10,000, in addition to any actual damages provided in subsection (a) of this section, except that in the case of a class action the total recovery under this subsection shall not exceed the lesser of $500,000 or 1 per centum of the net worth of the creditor. In determining the amount of such damages in any action, the court shall consider, among

other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

(c) Action for equitable and declaratory relief

Upon application by an aggrieved applicant, the appropriate United States district court or any other court of competent jurisdiction may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this subchapter.

(d) Recovery of costs and attorney fees

In the case of any successful action under subsection (a), (b), or (c) of this section, the costs of the action, together with a reasonable attorney's fee as determined by the court, shall be added to any damages awarded by the court under such subsection.

(e) Good faith compliance with rule, regulation, or interpretation of Bureau or interpretation or approval by an official or employee of Bureau of Consumer Financial Protection duly authorized by Bureau

No provision of this subchapter imposing liability shall apply to any act done or omitted in good faith in conformity with any official rule, regulation, or interpretation thereof by the Bureau or in conformity with any interpretation or approval by an official or employee of the Bureau of Consumer Financial Protection duly authorized by the Bureau to issue such interpretations or approvals under such procedures as the Bureau may prescribe therefor, notwithstanding

that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

* * * * *

6. 12 C.F.R. 202.2 (2010) provides in pertinent part:

Definitions.

* * * * *

(e) *Applicant* means any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of credit. For purposes of § 202.7(d), the term includes guarantors, sureties, endorsers, and similar parties.

* * * * *

7. 12 C.F.R. 202.7 (2010) provides in pertinent part:

Rules concerning extensions of credit.

(d) *Signature of spouse or other person*—(1) *Rule for qualified applicant.* Except as provided in this paragraph, a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested. A creditor shall not deem the submission

of a joint financial statement or other evidence of jointly held assets as an application for joint credit.

(2) *Unsecured credit.* If an applicant requests unsecured credit and relies in part upon property that the applicant owns jointly with another person to satisfy the creditor's standards of creditworthiness, the creditor may require the signature of the other person only on the instrument(s) necessary, or reasonably believed by the creditor to be necessary, under the law of the state in which the property is located, to enable the creditor to reach the property being relied upon in the event of the death or default of the applicant.

(3) *Unsecured credit—community property states.* If a married applicant requests unsecured credit and resides in a community property state, or if the applicant is relying on property located in such a state, a creditor may require the signature of the spouse on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the community property available to satisfy the debt in the event of default if:

(i) Applicable state law denies the applicant power to manage or control sufficient community property to qualify for the credit requested under the creditor's standards of creditworthiness; and

(ii) The applicant does not have sufficient separate property to qualify for the credit requested without regard to community property.

(4) *Secured credit.* If an applicant requests secured credit, a creditor may require the signature of the applicant's spouse or other person on any instru-

ment necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the property being offered as security available to satisfy the debt in the event of default, for example, an instrument to create a valid lien, pass clear title, waive inchoate rights, or assign earnings.

(5) *Additional parties.* If, under a creditor's standards of creditworthiness, the personal liability of an additional party is necessary to support the credit requested, a creditor may request a cosigner, guarantor, endorser, or similar party. The applicant's spouse may serve as an additional party, but the creditor shall not require that the spouse be the additional party.

(6) *Rights of additional parties.* A creditor shall not impose requirements upon an additional party that the creditor is prohibited from imposing upon an applicant under this section.

* * * * *

8. 12 C.F.R. 202.2 (1984) provides in pertinent part:

Definitions and rules of construction.

* * * * *

(e) *Applicant* means any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may be con-

tractually liable regarding an extension of credit other than a guarantor, surety, endorser, or similar party.

* * * * *

9. 12 C.F.R. 202.7 (1984) provides in pertinent part:

Rules concerning extensions of credit.

* * * * *

(d) *Signature of spouse or other person.* (1) Except as provided in this subsection, a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested.

(2) If an applicant requests unsecured credit and relies in part upon property to establish creditworthiness, a creditor may consider State law; the form of ownership of the property; its susceptibility to attachment, execution, severance, and partition; and other factors that may affect the value to the creditor of the applicant's interest in the property. If necessary to satisfy the creditor's standards of creditworthiness, the creditor may require the signature of the applicant's spouse or other person on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable State law to make the property relied upon available to satisfy the debt in the event of default.

(3) If a married applicant requests unsecured credit and resides in a community property State, or if the property upon which the applicant is relying is located in such a State, a creditor may require the signature of the spouse on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable State law to make the community property available to satisfy the debt in the event of default if:

(i) Applicable State law denied the applicant power to manage or control sufficient community property to qualify for the amount of credit requested under the creditor's standards of creditworthiness; and

(ii) The applicant does not have sufficient separate property to qualify for the amount of credit requested without regard to community property.

(4) If an applicant requests secured credit, a creditor may require the signature of the applicant's spouse or other person on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable State law to make the property being offered as security available to satisfy the debt in the event of default, for example, an instrument to create a valid lien, pass clear title, waive inchoate rights, or assign earnings.

(5) If, under a creditor's standards of creditworthiness, the personal liability of an additional party is necessary to support extension of the credit request-

ed,[10] a creditor may request that the applicant obtain a co-signer, guarantor, or the like. The applicant's spouse may serve as an additional party, but a creditor shall not require that the spouse be the additional party. For the purposes of paragraph (d) of this section, a creditor shall not impose requirements upon an additional party that the creditor may not impose upon an applicant.

* * * * *

[10] If an applicant requests individual credit relying on the separate income of another person, a creditor may require the signature of the other person to make the income available to pay the debt.

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No. 14-520

In the Supreme Court of the United States

VALERIE J. HAWKINS AND JANICE A. PATTERSON,
Petitioners,

v.

COMMUNITY BANK OF RAYMORE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE AMERICAN BANKERS ASSOCIATION, INDEPENDENT COMMUNITY BANKERS OF AMERICA, MISSOURI BANKERS ASSOCIATION AND MISSOURI INDEPENDENT BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does the ECOA's express definition of "applicant," when given its ordinary meaning and read in the context of the statute as a whole, include a guarantor, who merely signs a contract in support of the borrower's application for credit, or did the Federal Reserve Board attempt to redefine impermissibly the ECOA's "applicant" provision when the FRB amended its implementing regulation (Regulation B) to expressly include guarantors?

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BRIEF OF THE BANK INDUSTRY *AMICI* IN SUPPORT OF THE RESPONDENTS

INTEREST OF THE *AMICI*[1]

This brief is filed by the American Bankers Association, Independent Community Bankers of America, Missouri Bankers Association, and Missouri Independent Bankers Association (collectively the "*Amici*") in support of Respondent's position requesting affirmance of the Eighth Circuit's ruling.

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its over 1 million employees. ABA members provide banking services in each of the fifty States and the District of Columbia. ABA membership includes all sizes and types of financial institutions, including very large and very small banking operations.

The Independent Community Bankers of America ("ICBA") represents more than 6,000 community banks of various sizes and charter types and dedicates itself to giving voice to the interest of the community banking industry through effective advocacy, best-in-

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other an amici or their counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

class educational seminars, and high-quality products and services. ICBA members operate 52,000 locations nationwide, provide jobs for 700,000 employees and hold $3.6 trillion in assets, $2.9 trillion in deposits and $2.4 trillion in loans to customers, small businesses and the agricultural community.

The Missouri Bankers Association ("MBA") is a statewide association advocating for and representing more than 300 state and federally chartered banks located in Missouri. The MBA maintains an interest in promoting laws and policies that preserve a vibrant, free-market economy, and promote the availability of both sound and affordable credit for the benefit of the public and MBA member banks.

Missouri Independent Bankers Association ("MIBA") is a statewide trade association exclusively representing independent community banks serving over 400 communities across Missouri. The MIBA is dedicated to the preservation of banking law and structure which will assure the continued survival and prosperity of Missouri's independent, community banks for Missouri and its citizens.

Virtually all of the member financial institutions of the *Amici* provide business and commercial loans to corporations that involve personal guaranties of the commercial borrower's obligations. While the commercial venture holds the primary obligation to repay the loan, the guaranties provide secondary sources of potential payment in the event the corporate borrower defaults.

During the steep decline in the United States economy beginning in the fall of 2008, members of the

Amici frequently looked to guarantors to shore up the financial health of the commercial borrower, to provide necessary cash flow infusions, to find solutions and effective business strategies for the commercial borrower to rehabilitate problem loans, and, in the worst case of a default, to be responsible to pay the commercial borrower's obligations. Increasingly since 2009, member banks face claims from non-owner spousal guarantors contending that spousal guaranties constitute *per se* discrimination in violation of the ECOA and seeking a range of remedies including voiding the guaranties, voiding the entire loan obligation, and recovering money damages, including punitive damages.

The *Amici* therefore have a strong interest in the question whether the federal regulatory agencies exceeded their authority by re-writing definitions otherwise contained in the ECOA, without taking into account the necessity and real world requirements of assuring safe and sound lending practices which protect lenders and their customers. Neither lenders nor their customers benefit from over-reaching policies that weaken loan underwriting standards, that increase borrowing costs, or that restrict business credit.

SUMMARY OF ARGUMENT

Amici support the Respondent's position and ask the Court to enforce Congress' express definition of "applicant" in the ECOA and find that the federal agencies exceeded their rulemaking authority by impermissibly expanding the scope of the ECOA. The *Amici* do *not* seek to discriminate based on marital status against individuals or entities applying for commercial loans. In fact, the impermissible extension of the ECOA definition of "applicant" to non-owner spousal guarantors, places married business owners at a significant disadvantage compared to unmarried persons. By reaffirming the specific scope of "applicant" as plainly defined by Congress, the Court will assure that Regulation B implements the ECOA consistent with safe and sound lending practices involving business and commercial loans, and the Court will avoid permitting an agency "re-write" of the ECOA that disadvantages married persons.

In support of their position, the *Amici* advance three arguments. First, guarantors should not be considered "applicants" even setting aside the clear Congressional definition of that term in the ECOA, because the creditworthiness analysis of a guarantor differs from the creditworthiness of a prospective borrower and these differences make Regulation B's language extending anti-discrimination protections to guarantors unworkable. Second, permitting non-owner spousal guarantors to bring discrimination claims exposes lenders to liability and the risk of costly litigation based on an otherwise common-sense underwriting practice of obtaining guaranties to support commercial loans. Third, affirming the scope of "applicant" as

Congress originally intended will not permit lenders to engage in illegal discrimination because the parties that Congress chose to protect – applicants for credit – will still be empowered to bring discrimination claims.

ARGUMENT

I. GUARANTORS ARE NOT "APPLICANTS" FOR BUSINESS AND COMMERCIAL CREDIT; THE STANDARD CREDITWORTHINESS ANALYSIS OF THE BUSINESS ENTITY REQUESTING THE LOAN DIFFERS FROM THE SEPARATE CREDIT ANALYSIS OF A PERSONAL GUARANTOR AS A SECONDARY REPAYMENT SOURCE.

Separate and apart from the problem of re-defining Congress' definition of "applicant" the provisions of Regulation B which purport to grant ECOA claims and remedies to spousal guarantors cannot be reconciled with widely accepted practices lenders utilize to review and to underwrite commercial loans. In the commercial loan setting, the entity applies for a loan and becomes the subject of the lender's underwriting and creditworthiness analysis. Lenders will request guaranties of commercial loans not necessarily because the entity lacks creditworthiness, but to provide additional support to the commercial loan. The analysis to determine the type of support a guarantor can provide differs markedly from the creditworthiness analysis of the prospective borrower. In circumstances where a guarantor is married, the analysis, by necessity, must consider whether the guarantor's assets consist of individually owned or jointly owned property. Under common lending practices, a spouse's guaranty becomes necessary, not because of discrimination, but because of the need to support a

commercial loan with an effective guaranty from a married owner.

A. *Under Congress' precise wording, only borrowers "directly" apply for credit or "indirectly" apply for credit under an existing credit plan for an amount exceeding previously approved credit limits - guarantors do not.*

The clear wording Congress employed to define an "applicant" under ECOA excludes guarantors. Congress expressly defined the term "applicant" to encompass only those who apply "directly for an extension, renewal, or continuation of credit" or apply "indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit" 15 U.S.C. § 1691a(b). Guarantors do not apply for credit under these circumstances. *Moran Foods, Inc. v. Mid-Atlantic Market Dev. Co., LLC*, 476 F.3d 436, 441 (7th Cir. 2007). The guarantor neither receives credit nor is the guarantor denied credit. *Id.*; *See also*, *Champion Bank v. Reg. Dev. LLC*, Case No. 08CV1807, 2009 WL 1351122 at *2 (E.D. Mo., May 13, 2009) (noting that "a guarantor cannot be denied credit for which he or she did not apply, and thus it is difficult to conceive how a guarantor can claim to have been discriminated against.")

This very deliberate definition crafted by Congress serves the dual purpose of (1) clearly delineating those persons for whom Congress sought to provide protection from discrimination as well as (2) requiring that lenders perform their credit analysis on the *borrower* actually seeking the loan. When considering a commercial loan, such as the loans involved in this

case, the lender evaluates the creditworthiness of the entity applying for the loan to determine the willingness and capacity of the borrower to repay the loan under the terms proposed. A lender typically identifies the primary repayment source and one or more secondary repayment sources from the applicant borrower.

The primary repayment sources for commercial loans typically are the borrower's current and anticipated business revenues. The borrower's business assets and their potential liquidation value might also serve as a primary repayment source, such as in the case of a real estate development loan. Underwriting standards for most lenders include evaluating the prospective borrower's debt-service coverage ratios, loan to value ratios, global financial condition including amount and liquidity of assets, cash flow, direct and contingent liabilities, and equity. *See e.g.* Office of the Comptroller of the Currency, *Comptroller's Handbook on Safety and Soundness for Commercial Real Estate Lending*, August 2013 at pp. 8-9.[2]

In this regard "[t]he primary focus of an examiner's review of a commercial loan and binding commitments is the borrower's ability to repay the loan." *Id.* at p. 72. In commercial lending, including most small business loans (such as the loans here) the "primary source of repayment is often the cash flow of the business, either through the conversion of current assets or ongoing business operations." Office of the Comptroller of the Currency, *Interagency Statement on Meeting the Credit*

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[2] http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/cre.pdf.

Needs of Creditworthy Small Business Borrowers, OCC 2010-6, Feb. 2010.[3]

While the business revenues and assets provide primary repayment sources, a guaranty always functions as a secondary repayment source. A critical aspect of an "owner" guaranty in commercial and business loans is that it increases the business borrower's willingness to perform and to avoid a default on a commercial loan in order to protect the owner's personal assets and credit. The lender evaluates the guarantor to determine the guarantor's capacity and *willingness* to provide credit support, possibly through making payments, but also through continued involvement (expertise, management and time) in the borrower's business operations and in executing the business plan presented to the lender as part of the original loan request. Significantly for purposes of the ECOA, the role of the guarantor is to support the entity seeking the loan, not to apply for the loan individually based on her individual creditworthiness.

The Government argues that guarantors are properly considered "applicants" because guarantors are frequently involved in the application process. U.S. Br. at 20. While not yet determined, even if guarantors are involved in the application process Congress did not make "involvement" the touchstone for whether an individual or entity was an "applicant" under the ECOA. Instead, the definition focuses on whether the individual or entity *directly applied* for credit. 15

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[3] http://www.occ.gov/news-issuances/bulletins/2010/bulletin-2010-6a.pdf.

U.S.C. § 1691a. In this context, substituting "guarantor" for "applicant" in the provisions of Regulation B makes little sense and does not further the purposes of the ECOA.

At 12 C.F.R. § 202.7(d), Regulation B prohibits requesting a signature from a spouse or other person on any credit instrument if the applicant otherwise qualifies under the standards of creditworthiness for the amount and terms of the credit requested.[4] In this case, the borrower was seeking (and received) loans totaling over $2 million dollars. Pet. Br. 2. Nothing in the record establishes that either of the borrower's two owners (the guarantors) would have qualified for that magnitude of loans under Respondent's standards of creditworthiness. As a result, it makes little sense to provide guarantors with a discrimination claim based upon a creditworthiness analysis that never applied to the guarantors.

Substituting "guarantor" for "applicant" would require the lender to consider the individual creditworthiness of each guarantor for any commercial loan being requested. Affording guarantors the status of "applicant" under the ECOA does not comport with typical loan underwriting analysis nor with the secondary role that personal guaranties serve. Instead, Petitioners' position renders provisions of Regulation B incoherent in this respect. Extending the right to bring claims under the ECOA to guarantors cannot be

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[4] While the CFPB re-promulgated the provisions of Reg. B at 12 C.F.R. Pt. 1002 & Sup. I, the *Amici*, consistent with the practices of the United States and Petitioners, will refer to the provisions of Regulation B previously contained in 12 C.F.R. Pt. 202.

reconciled with the narrow Congressional definition of "applicant" or the separate credit analysis lenders must undertake to determine the willingness and capacity of a guarantor to perform his or her contracted obligations.

B. Lenders often obtain guaranties for commercial loans as part of safe, sound, lending practices.

Obtaining a guaranty for a commercial loan results from sound credit-making decisions and not from illegal discrimination.[5] In fact, bank regulators encourage lenders to obtain guaranties to provide valuable credit support. For example, when issuing its policy statement on commercial real estate workouts, the Office of the Comptroller of the Currency ("OCC") observed that guaranties from "financially responsible guarantor[s] may improve the prospects for repayment of the debt obligation[.]" Office of the Comptroller of the Currency *Policy Statement on Prudent Commercial Real Estate Loan Workouts*, OCC 2009-32, Oct. 30, 2009.[6]

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[5] The June 28, 1973 Senate Report for the bill creating the ECOA, S. 2101, recognized that credit decisions, by necessity, involved "discriminating" against applicants to determine which are creditworthy and which are not. The crux of an impermissible discriminatory lending decision, according to the Report, was that the lender denied credit to an applicant, not based on credit criteria, but based on membership in a class. S. Rep. No. 93-278, at 19 (1973).

[6] http://www.occ.gov/news-issuances/bulletins/2009/bulletin-2009-32.html.

Guarantors can support a loan application and the likelihood of repayment because guarantors may continue business operations in the face of economic stress, provide management and expertise, and provide financial support to the enterprise to meet expenses during periods of negative cash flow. At the extreme end of the spectrum, guarantors may serve as an additional, but always secondary, source of recovery for the lender if the commercial enterprise fails and defaults on payment of the commercial loan.

For most small business loans, and in most, if not all project-based loans (where, as here, the loan finances a real estate development) the business acumen/expertise of the owner is a key factor in the success of the business or project. As the recent economic downturn illustrated, competent and committed ownership may be the difference between an enterprise that closes its doors and an enterprise that weathers the downturn and survives. In circumstances where an owner might be tempted to abandon a project, handing the keys to the bank, and walking away, the personal guaranty obligations incentivize the owner not to throw in the towel but, instead, to double-down and work to make the business successful and viable.

Given that the value of the guarantor's support depends on the ability to provide financial support to the borrower, prudent lenders evaluate the potential guarantor's global financial condition to determine whether the guarantor possesses sufficient assets to assist the borrower and help fund a shortfall. An analysis, by necessity, considers whether the guarantor's global financial condition includes jointly held assets, including marital assets and earnings

which, in the case of a married guarantor, without a joint-spousal guaranty would be unavailable to provide support for the owner's guaranty.

The strength of a married person's guaranty, in most cases, will be much weaker without their spouse joining in the guaranty since all assets and earnings acquired during a marriage are marital assets regardless of how assets may be titled. The individual guaranty of one spouse does little to demonstrate or procure the capacity and willingness of the guarantor to perform his or her obligations. The individual guaranty of a married business owner often has little practical value because the assets demonstrating the quality and strength of the guaranty are part of a marital estate and cannot be placed in peril by one spouse acting alone. Thus, the requirement of a non-owner spousal guaranty has little to do with outdated stereotypes based on gender or marital status and everything to do with sound underwriting analysis and obtaining maximum credit support for a commercial loan. In fact, the June 28, 1973 Senate Report acknowledged as much when it observed that "[i]f an applicant does not have and control his or her *own* income or assets which can clearly be used as a source of repayment, denial of credit would be based on proper credit criteria and the concept of discrimination would be inapplicable." S. Rep. 93-278 at 19 (1973) (emphasis in original).[7]

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[7] Of note, the legislative history of the ECOA focused entirely on protecting applicants as individuals applying for credit, not protecting guarantors.

C. Signatures from spouses for commercial loans are frequently obtained not because of any discriminatory "marital status" animus toward the borrower or guarantor / owner but because marital assets may provide the sole basis for ascribing "value" to their guaranties.

Lenders can obtain guaranties from the individual owners of a corporate borrower without even potentially running afoul of the ECOA. But where the business owner is married, the lender faces significant risks in either proceeding to make the loan without a spousal guaranty (in which case the owner-spouse's guaranty is probably worthless) or in obtaining the non-owner spouse's guaranty (which may result in Regulation B litigation if the lender is forced to pursue the guaranty). Permitting the spouses of the corporate owners to challenge the validity of their guaranties under the ECOA contradicts the very common sense reasons why lenders can (and should) obtain these spousal guaranties.

Recognizing the important role individual owners play in the operation of an entity, the Regulations expressly permit a lender to obtain guaranties from corporate owners and officers without fear of violating the ECOA. Official Staff Interpretations at Paragraph 202.7(d)(1), Comment 3, as amended by 68 Fed. Reg. 13,144, 13,191 (2003). The FDIC echoes this interpretation in its guidance letters to the banking industry. FDIC FIL-6-2004 – Guidance on Regulation B Spousal Signature Requirements.[8] Similarly, where the applicant requests credit but relies on the income

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[8] https://www.fdic.gov/news/news/financial/2004/fil0604a.html.

of another person (including a spouse) the signature of the other person on a credit instrument may be required to make the income available to pay the debt. 12 C.F.R. Part 202, ECOA (Reg. B), Supplement I to Part 202 – Official Staff Interpretations, § 202.7 ¶7(d)(2). Under these interpretations, where a spouse is also an owner of the corporate borrower, there is no Regulation B violation at all if the lender obtains a guaranty from the co-owner spouse.

As discussed above, in the case of a closely-held business, the owner's individual guaranty reinforces the owner's commitment to support the entity receiving financing. The reinforcement occurs, typically, through two methods (1) a source of capital and liquidity to the corporate borrower; and (2) an incentive for the owners to provide continued management and expertise. Because a central purpose of incorporating an entity to transact business is to protect personal, individual assets, the importance of guaranties from corporate owners is that they provide assurances to the lender that the owners will be personally responsible if the entity fails and the business's assets do not provide sufficient value to repay the loan. The guaranty makes those personal assets available to the lender as a source of repayment. That otherwise sensible trade-off becomes undeniably inequitable if the corporate owner's jointly-owned, marital assets can be put "off limits" because the lender cannot obtain a guaranty from the spouse because doing so would allegedly violate Regulation B. If a lender cannot obtain a guaranty of business debt from a non-owner spouse, then the lender runs the risk that the borrower entity will dissolve and the lender will have little or no effective recourse against a guarantor whose joint

assets are exempt from an individual judgment. *See* Leslie A. Kulik, *Guaranteeing Credit for Others; the Federal Reserve Board's "Regulation B" Requires Amendment*, 67 J. Mo. Bar. 224, 227 (2011) (noting that under Regulation B, "requiring the spousal guaranty is prohibited, even if the spouse partakes of the enjoyment of the profits of the business and even if there are joint assets that appear in the owner-spouse's financial statements.")

In most circumstances, corporate owners who are married attempt to establish the "value" of their personal guaranty by submitting joint financial statements showing most (if not all) assets to be jointly owned. A guaranty signed by only one spouse cannot be evaluated and underwritten on this basis. A paradox in the official interpretations shows that a lender *is* permitted to consider the marital status of an applicant when evaluating "rights and remedies" applicable to the particular extension of credit – giving the example of a secured transaction involving real property and the necessity of considering whether the applicant's spouse would have an interest in the property (and, if so, the necessity of a spousal signature to secure the transaction). Supp. I, Official Staff Interpretation, ¶ 6(b)(8). Similarly, when evaluating the strength of a guaranty, the lender must consider how the guarantor's marital status affects the guaranty's value. To prohibit such analysis – as Regulation B purports to do – defies logic.

If Regulation B prohibits the lender from obtaining a guaranty from the non-owner spouse, then married guarantors will in most instances never be able to provide evidence of sufficient, individually-owned

property to satisfy the lender's requirement of the necessary value to support the guaranty. The FDIC recognizes this very practical consideration and, in its interpretative letters, states as follows:

> Some states' property laws treat married applicants differently from unmarried applicants in a way that affects their creditworthiness. For example, several states provide that real property and/or personal property acquired by married persons jointly is owned as tenants by the entirety[.] In such states, if state law so provides, a creditor could require the signature of the non-applicant spouse where the creditor relies upon real property and/or personal property owned by the applicant and the applicant's spouse as tenants by the entirety in order to qualify the applicant for the loan.

FIL-6-2004. This instruction emphasizes two things: (1) the legitimate, non-discriminatory reasons for obtaining a spousal guaranty; and (2) the unworkable analysis if the word "guarantor" is substituted for "applicant"

By acknowledging a broad category of circumstances where a spousal signature legitimately may be required, the FDIC recognizes multiple scenarios where the requirement of a spousal signature to a note, guaranty or security agreement has appropriate and non-discriminatory purposes. The same is true where an owner/guarantor purports to show the value of a guaranty by relying on jointly-owned assets. Particularly, in tenancy by the entirety states, such as Missouri (whose law governs in the general the loans at issue in this case) the spouse's guaranty becomes

necessary not because of antiquated stereotypes involving gender or marital status, but because of state property laws and the inability to look to jointly-owned property to underwrite a guaranty without the spouse's guaranty. *See e.g. Blakewell v. Breitenstein*, 396 S.W.3d 406, 412 (Mo. Ct. App. 2013).

In addition to highlighting that there is no discriminatory intent necessarily attendant with many instances of obtaining spousal guaranties, the FDIC's instruction further underscores the difficulty associated with extending "applicant" status to guarantors. The guideline speaks of different ways in which state laws treat the property of married applicants versus unmarried applicants, noting the difference because such discrepancies impact the applicant's "creditworthiness" FIL-6-2004. In the context of guarantors, Regulation B provides no clarity regarding the underwriting of married guarantors to assure that the guaranty is creditworthy. As discussed above, lenders do not evaluate the prospects of a commercial loan based on the guarantor's creditworthiness. Instead, the loan will be underwritten based on the *borrower's* creditworthiness, not the guarantor's.

A guaranty is a secondary repayment source and the strength of a guaranty is separately evaluated from the credit analysis of the applicant. Additionally, the FDIC guidelines refer to the circumstance where the jointly-owned property forms the basis for the "applicant" qualifying for the loan. But in the guarantor context, the guarantor is not the individual applying for a loan. The guarantor's financial strength factors into whether the guarantor will provide a

secondary source of repayment in the event of the borrower's default and also to incentivize the borrower's and the owner/guarantor's willingness to repay and to stay engaged in the business enterprise.

Prudent credit standards typically require the personal guaranty of the business owner for a commercial loan. In this regard the incongruity of Regulation B is revealed in 12 C.F.R. § 202.7(d)(5) because it prohibits a lender from "requiring" the spouse of a married guarantor to be an "additional party" to a personal guaranty. As noted previously, a married owner's guaranty is of dubious value unless it is joined with the spouse's guaranty since all property and assets acquired in a marriage are presumed to be marital assets. If only one spouse signs, the guaranty is not effective to serve its intended purposes.

Because lenders seek guaranties to support commercial loans, and because Regulation B permits lenders to obtain individual guaranties from corporate owners without fear of violating the ECOA it makes little sense to deny lenders the ability to obtain a guaranty from the spouse of the corporate owner. This is true because, as demonstrated above, married guarantors rarely have readily identifiable, individually-owned assets sufficient to provide adequate credit support. Married owner/guarantors commonly rely on jointly-owned assets to demonstrate the financial strength of their guaranty. Obtaining a guaranty from a non-owner spouse in such circumstances is not "discrimination" on the basis of marital status stereotypes, but rather a sound lending practice for obtaining an effective and creditworthy guaranty. If guarantors are permitted to raise

discrimination claims under these facts, lenders will face unacceptable litigation risks and will be forced to increase the cost of credit and in some cases deny commercial loans where an owner is married but has inadequate assets to support a guaranty as a secondary repayment source.

II. PERMITTING GUARANTORS TO BRING ECOA CLAIMS WILL EXPOSE LENDERS TO UNWARRANTED, INCREASED RISKS OF LITIGATION COSTS THE RESULTS OF WHICH WILL BE TO EITHER INCREASE THE COST OF CREDIT OR INCENTIVIZE LENDERS TO INCREASE BUSINESS AND COMMERCIAL UNDERWRITING STANDARDS FOR MARRIED BUSINESS OWNERS OR BOTH.

A. Litigation risk and costs associated with lending discrimination claims by a massive class of guarantors represents a significant concern for lenders.

By including guarantors as "applicants" for purposes of 12 C.F.R. § 202.7(d), the Government (previously the Board of Governors and now the CFPB) exposes banks and other creditors to unnecessary litigation risk and costs associated with loans that involve non-owner spousal guarantors. The risks of litigation arising from discrimination claims brought by guarantors raise significant concerns among lenders, including litigation exposure and costs, reputational harm, and the possibility of a guarantor invalidating not only the alleged offending guaranty, but also the underlying loan transaction itself. Additionally, the lender runs the risk that the guarantor will seek money damages (including punitive damages) as part

of the guarantor's lawsuit. *See* 15 U.S.C. § 1691e. Regardless of whether a lender is found to have, in fact, discriminated against a guarantor, the lender will be forced to incur the cost of defending against any and all guarantors' discrimination claims. Defending against an ECOA claim can wipe out a bank's earnings not just of the loan at issue but also the earnings for an entire commercial portfolio.

Of further concern to lenders, court rulings appear to restrict the lenders' ability to document the non-discriminatory nature of the guaranties. Thus, if Regulation B permissibly extends the scope of "applicant" to include spouses of owners who have signed guaranties for commercial loans, a lender may be unable to insulate itself from liability no matter the language used in the guaranties. For example in *Frontenac Bank v. T.R. Hughes, Inc.*, the Missouri Court of Appeals concluded that language in the spouse's guaranties making clear that the spouse had *volunteered* to sign the guaranty (i.e., the lender did not "require" it) was not dispositive of the issue of marital status discrimination. 404 S.W.3d 272, 287-88 (Mo. Ct. App. 2012).

Just as in this case, the guaranties in *Frontenac* Bank stated that "this guaranty is executed at borrower's request and not at the request of the lender[.]" *Id.* at 287. According to the testimony from the non-owner spouse, she only signed what her husband, the owner of the corporate borrower, asked her to sign. *Id.* at 288. The owner spouse testified that, to the contrary, he did not offer the guaranties, but instead they were required by the bank. *Id.* The testimony contradicting the allegedly "involuntary"

nature of the guaranties came *8 years* after the parties signed the guaranties, and was given only in the context of the commercial loans having gone into default, the bank selling the collateral, and then seeking to recover from the guarantors for the deficiencies on the loans. *Id.* at 276-77.

By finding that the trial court could conclude, based on the "evidence," that the guaranties were not voluntarily provided, the Missouri Court of Appeals effectively nullified lenders' ability to document the non-discriminatory basis for a spousal guaranty, and thus to guard against discrimination claims from individuals who signed guaranties so that their spouses' companies could obtain credit. Upholding Regulation B's re-write of the ECOA to include guarantors therefore exposes lenders to litigation risks against which lenders have few, if any, defenses.

B. In the face of increased litigation risk and minimal protections, lenders likely will avoid loans where an owner of a corporate borrower is married, but the spouse is not also a documented owner of the entity.

Perversely, Regulation B's re-write of ECOA results in a married business owner facing different and higher credit thresholds than a single person – a result contrary to the objectives of Congress in enacting the ECOA. A lender evaluating a commercial loan request involving a married owner with jointly owned assets faces, essentially, three options: (1) deny the loan; (2) extend the loan without the non-owner spouse's guaranty; or (3) make the loan, accept the non-owner spouse's guaranty, but face the risk that the non-owner spouse may, at some point in the future, claim the

lender discriminated in accepting the guaranty. Given the litigation and liability risks, making the loan and obtaining a guaranty from the non-owner spouse would be most imprudent. In order to mitigate the risks of proceeding without a spousal guaranty, the lender might increase the fees and costs for the loan (e.g. increase the interest rate), shorten the loan term to provide for the borrower pay off the lender at an accelerated rate to reduce the length and amount of the exposure, or, seek express pledges of collateral, some of which could be marital property which would require the spouse's signature in any event. These alternate options are often unattractive to a borrower, may cause the borrower to reject the loan, and perversely could result in less favorable treatment of a married business owner as compared to an unmarried business owner.

In a lending climate where federal and state regulators press lenders to do everything possible to secure loans, lenders would become understandably fearful and wary of extending loans which would otherwise require a spousal guaranty. As a result, married small business owners face daunting obstacles to obtaining credit. A married business owner could make the non-owner spouse a co-owner of the business. However, this might not be a viable option if there are other investors in the ownership structure of the borrower. Perhaps another option for a married business owner would be to find a third-party willing to invest in the company or provide a guaranty, but even if such a person could be found, it would not solve the problem of the married owner whose financial statement shows only jointly-owned, marital assets that are otherwise unavailable if the lender needs to

enforce the guaranty.[9] Finally, a married owner might volunteer the non-owner, spouse's guaranty (as is often the case), but this presents a significant risk for the lender in the event the loan goes into default (as it did in this case) because the spousal guarantor, contrary to written representations made to induce the extension of credit, may contend the guaranty was the product of "marital status" discrimination (as the spousal guarantors did in this case) or was not given voluntarily (as the spousal guarantors argued in this case).

To the contrary, if non-owner guarantors cannot bring discrimination claims under the ECOA because they are not "applicants," and instead the ECOA is limited to what Congress intended (only those directly applying for credit) then the lender can evaluate the creditworthiness of the borrower, and if guarantor support is warranted then the lender can underwrite the guaranty as secondary loan support without concern that a guaranty agreement provides an unwarranted claim for discrimination several years after the lender makes the loan. Under this framework, if the prospective borrower (as applicant) believes a lender's decision to decline the loan or to extend the loan only on less favorable terms resulted from

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[9] Additionally, it is likely that the married business owner who is required to obtain a third party guaranty because of the lack of non-marital property would claim that such a requirement discriminates based on marital status. Thus the Catch-22 for lenders: either accept a spousal guaranty and face claims of marital status discrimination, or request a third party guaranty (not from the spouse) and face claims that the request for an additional guaranty resulted from marital status discrimination.

discriminatory animus, the borrower/applicant can bring a claim under the ECOA. But it is the borrower's claim to bring, and this posture permits the lender to explain its underwriting analysis and show why the guaranty requirements did not result from discriminatory "marital status" animus but, rather, resulted from legitimate considerations such as state property laws with respect to marital property rights. *See* 12 C.F.R. § 202.6(c). In that scenario, the discrimination analysis becomes similar to the familiar *McDonnell Douglas* burden-shifting framework for employment discrimination.[10] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

C. By extending the ECOA to non-applicant guarantors, Regulation B exposes lenders to strict liability, effectively imposing on lenders the burden to prove the lack of discrimination.

In addition to providing non-owner guarantors the ability to challenge loan transactions many years after the loan has been approved and extended to the corporate borrower, Regulation B imposes near strict, or *per se,* liability for discrimination in any context where the lender obtains a non-applicant spouse's guaranty, unless the lender can satisfy the heavy and costly burden of proving non-discrimination. In *RL BB Acquisition, LLC v. Bridgemill Commons Development*

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[10] The ECOA plaintiff would have to first establish a *prima facie* case of discrimination e.g. (1) that the applicant is a member of a protected class; (2) the applicant qualified for the loan under the lender's standards of creditworthiness; and (3) the lender denied the loan or extended the loan but on more onerous or less favorable terms that applicants from a non-protected class.

Group, LLC, the Sixth Circuit illustrated this approach, declaring that Regulation B prohibits "'requir[ing]' the guaranty of a spouse as a general matter, *regardless of whether the creditor's motivation is benign or invidious*." 754 F.3d 380, 389 (6th Cir. 2014) (emphasis added). Therefore, according to the Sixth Circuit, the plaintiff guarantors "do not need to prove discrimination" *Id.* Instead, the guarantor only needs prove that the "spouse applied for credit and either the creditor 'require[d] the signature of [the] applicant's spouse' if the applicant was individually creditworthy or the creditor 'require[d] that the spouse be the additional party' when it determined that the applicant was not independently creditworthy and would need the support of an additional party." *Id.* Again, the error is in not recognizing that underwriting a guaranty is separate from and not the same as underwriting the commercial loan applicant.

These putative elements highlight the reasons why extending "applicant" status to guarantors becomes problematic as discussed above. The first element articulated in *RL BB Acquisition* refers to when a spouse "applied for credit" but in the guarantor context, the guarantor *never* applies for credit. The element proceeds to focus on situations where the applicant was "individually creditworthy" even though the lender evaluating a corporate loan is not evaluating the creditworthiness of the *guarantor*. Thus, the Sixth Circuit's erroneous decision further demonstrates why including guarantors as "applicants" for the purpose of spousal signature provisions strains the ECOA beyond all reason.

Furthermore, the Sixth Circuit's and the Government's approach shifts the full burden of proving the *absence* of discrimination to the lender. Under the provisions of Regulation B, if a lender obtains a guaranty of a corporate loan from the spouse of an owner, the guaranty by the non-owner spouse is *presumed* to be discriminatory. *See* 12 C.F.R. § 202.7(d)(1). And in accepting the guaranty from the non-owner spouse, the lender likewise accepts the risks that if the borrower becomes unable to repay the debt, then the non-owner guarantors may claim the guaranties were discriminatory and seek to undo not only the guaranty, but also the full underlying loan transaction *and* seek money damages including punitive damages.[11]

This case clearly demonstrates the risk facing lenders who choose to make loans which include obtaining non-owner spousal guaranties. Here, a company owned by Petitioners' husbands obtained several loans from Respondent over the course of a multi-year relationship. Several times, CBR obtained guaranties from the owner-husbands as well as from the Petitioners, and each time Petitioners promised to

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[11] The Government argues that potential remedies for ECOA violations should not factor into the analysis of whether the federal agencies permissibly expanded the definition of "applicant" to include guarantors, but only for purposes of § 202.7(d). U.S. Br. at 34. Far from being irrelevant, the potential remedial implications of obtaining a non-owner spousal guaranty illustrate the risks lenders face when considering whether to obtain all the documentation necessary to make a safe and secure loan in light of the risk that doing so may ultimately require the lender to prove, through costly litigation, the absence of discrimination against the non-owner spouse.

repay the corporate borrower's indebtedness in the event of default.[12] Seven years later, after the borrower had defaulted on the loan and was unable to repay the indebtedness, the Petitioners asserted for the first time that they were the victims of marital status discrimination each and every time they signed a personal guaranty.

Strikingly, Petitioners made no allegation that the owner spouses were individually creditworthy for the loan being requested by the corporate borrower. Granting Petitioners a cause of action under the ECOA based on these facts would demonstrate why Regulation B impermissibly expands the definition of "applicant" to a category of persons for whom Congress did not intend to provide protection under the ECOA.

III. LENDERS WILL NOT BE AUTHORIZED TO DISCRIMINATE AGAINST BORROWERS ON A PROHIBITED BASIS IF THE ECOA DEFINITION OF "APPLICANT" DOES NOT INCLUDE GUARANTORS.

Contrary to the arguments of Petitioners and the Government, excluding guarantors from the definition of "applicant" will not lead to widespread, illegal discrimination by lenders against borrowers. When Congress first enacted the ECOA, no part of the

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[12] Petitioners repeatedly and mistakenly assert that guaranty agreements placed the Petitioners in the same position as if they had co-signed the promissory notes. *See e.g.* Pet. Br. at 34. This inaccurately describes guaranty agreements. Instead, as the Government correctly sets forth, a guaranty agreement is one in which a party assumes secondary liability for a debt obligation in the event the primary obligor defaults. Gov. Br. at 4.

legislative history focused on any need to protect non-owner spouses who were asked to guarantee loans obtained by entities in which the other spouse was either an owner or co-owner. Interpreting the ECOA's definition of "applicant" consistent with the statute's plain language will not permit wanton and illegal discrimination by lenders. In fact, the position taken by both Petitioners and the Government places married business owners at a disadvantage compared to non-married owners.

As both Petitioners and the Government acknowledge, Congress' purpose in enacting the ECOA was to make credit available to all creditworthy applicants without regard to the applicant's gender or marital status. Pet. Br. at 21-22; Gov. Br. at 2. However, Petitioners and the Government gloss over Congress' very specific definition of "applicant" and proceed to try and justify Regulation B without even addressing the fact that the language of the ECOA expressly defines "applicant" as one who *directly* applies for credit or indirectly applies under an existing credit plan for an amount in excess of previously established credit limits. 15 U.S.C. § 1691a(b). The Government only references this definitional constraint in passing and simply asserts, in conclusory fashion, that "[g]uarantors apply for credit 'directly'". U.S. Brief at 19 n.7. Notably, the Government never explains *how* guarantors apply "directly" for credit.

The Government also suggests that the language of the ECOA should be read to provide non-owner spouses who guarantee the business debts of their spouse's company a cause of action for discrimination, but none of the Government's arguments satisfactorily establish

how such causes of action are consistent with the central purpose of the ECOA. In passing the ECOA, Congress focused on eradicating credit discrimination against women, particularly married women, who traditionally experienced challenges in obtaining individual credit. *Anderson v. United Fin. Co.*, 666 F.2d 1274, 1277 (9th Cir. 1982). The discrimination women suffered from lenders took the form of the inability to receive individual credit on the same or similar terms that men, including married men, received. *Rowe v. Union Planters Bank of S.E. Mo.*, 289 F.3d 533, 535 (8th Cir. 2002). Thus, a woman could prove a claim of lending discrimination under the ECOA by showing that she was qualified for the loan but that the lender refused to extend the loan despite her qualifications or that the lender required additional terms (such as co-signature by husband) that the lender did not require if the borrower was a man. *Rowe*, 289 F.3d at 535.

The language in the ECOA was deliberately chosen and appropriately reflects Congress' intent to protect women who "applied" "directly" for credit, without extending the ECOA to all persons involved, in any way, in a credit transaction. Giving effect to the plain language of the ECOA's definition of "applicant" will not permit lenders to discriminate against an applicant who applies for a loan based on that person's gender or marital status. If a woman applies for a personal, or commercial loan from a bank and she meets the lender's requirements for creditworthiness, she will receive that loan on the same basis as if her spouse had been the applicant and met the same requirements. Her right to receive credit without discrimination can be protected by giving her a cause of action against the lender under the ECOA. Her rights are not protected,

however, by providing her husband with a cause of action to contend his joint-guaranty, if obtained, is discriminatory.

In the case where a women-owned business attempts to receive a loan, but the lender refuses to provide the loan based on the fact that women own the borrower, the ECOA would provide the business itself with a cause of action for discriminatory lending.[13] It is conceivable that an entity received discriminatory treatment because its women owners were required to obtain their husbands' guaranty of the debt whereas businesses owned by men did not have to satisfy such a requirement under similar circumstances. In both those circumstances, however, the cause of action under the language of the ECOA belongs to the borrower – the "applicant" Permitting the husband-guarantors to bring a claim under the ECOA, based on this hypothetical, would do nothing to further the anti-discrimination purposes of the statute. *See Champion Bank*, 2009 WL 1351122 at *3 (noting that stretching the ECOA's protections to a non-owner, guarantor spouse "expands the ECOA beyond its intended purpose"). Expanding the class of "applicants" would, however, have significant consequences for both lenders and borrowers as explained previously.

Petitioners' and the Government's overreaching becomes more apparent if one considers a hypothetical

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[13] The Government acknowledges that such a business entity would be able to bring an ECOA claim, even though it is a corporate entity. U.S. Br. at 28 n. 14. Petitioners' argument that such a claim would not be recognized is flatly, incorrect. Pet. Br. at 29-30.

situation where a non-owner spouse *declines* to sign a guaranty and the lender refuses, therefore, to make a loan to the corporate borrower. Would any purpose of the ECOA be furthered by permitting the non-owner spouse to bring a cause of action for discrimination under the ECOA where the non-owner spouse did not apply for a loan, did not sign a guaranty, and was not denied a loan? Against whom was the discrimination? And what are the damages?

Yet under the language of the spousal signature provisions in Regulation B the infraction occurs when the lender required the additional party's signature, and Regulation B does not differentiate between whether the additional party actually signed the document or not. If it makes little sense to provide the non-owner spouse with a cause of action if she *declines* to sign the guaranty, it also makes little sense to provide the non-owner spouse with an ECOA cause of action if she *does* sign the guaranty.[14] This is true because the person who would have a claim in both circumstances would be the borrower/applicant who was either denied the loan because the spouse refused to guaranty the debt, or who received the loan but only because the spouse agreed to guaranty the debt where such guaranty would not otherwise have been required.

Petitioners incorrectly suggest that no remedy exists for discrimination if the ECOA does not provide

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[14] Indeed the Eighth Circuit noted the internal inconsistency in reading the ECOA (designed to protect women from being excluded from credit) to recognize a claim by non-owner spouse who alleges discrimination precisely because she was *included* in a loan transaction. *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937, 942 (8th Cir. 2014).

a cause of action to non-owner spousal guarantors. That is simply not true. Based on the facts of this case, an ECOA claim could have been brought by the borrower, PHC Development, LLC. Pet. Br. at 2. If, in fact, PHC received less-favorable loan terms because of the alleged requirement of guaranties from non-owner spouses, then the ECOA afforded PHC a cause of action. At the very least, PHC's owners could have pursued such a claim arguing that the lender discriminated against their company by denying a loan without the additional party guaranties. These would be the parties that ostensibly suffered from putative discrimination.

Identifying proper plaintiffs under the ECOA as only those persons or entities that applied for credit (and excluding guarantors) would not alter or reduce the ability of PHC to assert discrimination claims. Rather, the only claim that would be excluded would be a claim of discrimination by a non-owner spouse who, as is alleged in this case, had no ownership interest or role in the corporate borrower (even though non-owner spouses made contrary representations in their guaranties). Pet. Br. at 2. Nothing in the legislative history of the ECOA suggests that Congress sought to provide such non-owner spousal guarantors with a cause of action alleging lending discrimination. And as demonstrated previously, extending the ECOA to non-owner guarantors may have the ironic result of disadvantaging married business owners who seek credit – a perversion of the ECOA that Congress did not intend.

CONCLUSION

For the reasons set forth above, the *Amici* support Respondent Community Bank of Raymore in its request that this Court to affirm the Eighth Circuit.

Respectfully submitted,

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